SECTION 21

Digests

Timeliness of Appeal

The Seventh Circuit affirmed the Board's dismissal of employer's appeal as untimely, holding that the 30-day period for filing an appeal to the Board from an adverse administrative law judge decision begins to run on the day the administrative law judge's decision is filed in the office of the deputy commissioner. Under 20 C.F.R. §702.349, the failure to serve a copy of the administrative law judge's order on employer's counsel did not prevent the order from being "filed" and becoming effective for the purpose of the appeal period. Jeffboat, Inc. v. Mann, 875 F.2d 660, 22 BRBS 79 (CRT) (7th Cir. 1989).

The Ninth Circuit reversed the Board's determination that an appeal must be filed within 30 days from when the district director files the administrative law judge's order regardless of whether the parties have been served. The court held that under Section 19(e), service on the parties, *i.e.*, claimant and employer, must be effected by certified mail before a compensation order is deemed filed. The court noted that 20 C.F.R. §702.349 is ambiguous on this, but that the black lung regulation, 20 C.F.R. §725.478, requires service on the parties and the court reads the sections compatibly. In this case, because there was a dispute as to when claimant received the administrative law judge's order, the court instructed the Board to remand this case to the administrative law judge to give him the opportunity to conduct an evidentiary hearing as to when petitioner was served with the order. *Nealon v. California Stevedore & Ballast Co.*, 996 F.2d 966, 27 BRBS 31 (CRT)(9th Cir. 1993).

The Board reaffirms its earlier order dismissing employer's appeal as untimely. The time for filing a notice of appeal runs from the date the decision is "filed" by the district director, and not from the date counsel actually received the decision. Moreover, the case is not akin to *Nealon* in that there is no allegation of improper service, and the inquiry under the Act does not concern service on counsel. The Board also rejects the contention that FRCP 6(e) applies to add three days on to the end of the 3-day period. Under Rule 81(a)(6) the Rules apply to "proceedings for enforcement or review" under Sections 18 and 21, and are not by their terms applicable to administrative proceedings. Furthermore, Rule 6(e) applies when the time period runs from "service," and the Section 21(a) time period runs from "filing," and the Rule does not apply to extend jurisdictional provisions, such as enlarging the time in which a notice of appeal must be filed. *Beach v. Noble Drilling Corp.*, 29 BRBS 22 (1995) (order on recon. *en banc*) (Brown and McGranery, JJ., dissenting).

Improper mailing of administrative law judge's decision to claimant's counsel does not extend the time for filing an appeal with the Board. The Board notes that claimant's receipt of the decision was established by a Postal Service delivery receipt. Benschoter v. Brady-Hamilton Stevedore Co., 18 BRBS 15 (1985).

The Board viewed the deputy commissioner's letter purporting to alter language contained in an administrative law judge's decision as an impermissible modification under Sans, 19 BRBS 24 (1986), and Penoyer, 9 BLR 1-12 (1986). Reasoning that the deputy commissioner possessed no authority to issue this letter, the Board held that both the letter and the administrative law judge's second decision issued in response to it were of no legal effect, and that the period for filing an appeal with the Board began when the administrative law judge's first decision was filed. The Director's appeal, submitted some six months after this decision was filed in the deputy commissioner's office, was thus dismissed as untimely. Hernandez v. Bethlehem Steel Corp., 20 BRBS 49 (1987).

On reconsideration, the Board vacated its decision in *Maria v. Del Monte/Southern Stevedore*, 21 BRBS 16 (1988)(McGranery, J., dissenting), in which it held that a letter from the Associate Director, OWCP, delaying the commencement date for the Special Fund's payment of benefits, constituted a final decision, appealable to the Board under Section 21(b)(3). The Board holds that the letter was not an attempted modification of the administrative law judge's Decision and Order and was not a final appealable action. Rather, the letter notified claimant that the Fund was suspending compensation until a statutory credit was recouped. The associate director's actions in withholding compensation were similar to those of employer in *Shoemaker v. Schiavone & Sons, Inc.*, 20 BRBS 214 (1988). Claimant's remedy in cases involving a unilateral termination of compensation is to seek a default order pursuant to Section 18. *Maria v. Del Monte/ Southern Stevedore*, 22 BRBS 132 (1989), *vacating on recon. en banc,* 21 BRBS 16 (1988).

The Board's regulation, 20 C.F.R. §802.205A (now 802.206), stating that the time for filing an appeal is tolled when a timely motion for reconsideration is filed, is not in conflict with Section 21(a) of the Act. Thus, the regulation is valid and enforceable, and the Board properly dismissed an appeal pursuant to the regulation. The rule serves the purpose of administrative and judicial economy. Jones v. Illinois Central Gulf Railroad, 846 F.2d 1099, 11 BLR 2-150 (7th Cir. 1988)(black lung case).

Settlement order became final within thirty days under Section 21(a). Claimant's failure to raise administrative law judge's authority by filing an appeal within that time renders the order *res judicata* between the parties since settlements are not subject to modification under Section 22. Downs v. Director, OWCP, 803 F.2d 193, 19 BRBS 36 (CRT)(5th Cir. 1986), aff'g Downs v. Texas Star Shipping Co., Inc., 18 BRBS 37 (1986).

The Fifth Circuit held that where an administrative law judge grants a party's motion to withdraw its motion for reconsideration, the time for filing a notice of appeal is measured from the date that the administrative law judge ruled on the motion to withdraw. Board therefore erred in not dismissing an appeal as premature filed prior to the dismissal of the motion for reconsideration. *Tideland Welding Service v. Sawyer*, 881 F.2d 157, 22 BRBS 122 (CRT) (5th Cir. 1989), *cert. denied*, 495 U.S. 904 (1990).

The Board dismissed an appeal as premature pursuant to 20 C.F.R. §802.206(f) where the Director had filed a timely motion for reconsideration with the administrative law judge. The fact that employer was now precluded from filing a new appeal after the administrative law judge's decision on reconsideration cannot alter the result, even though the dismissal is to be without prejudice, given the mandatory language of the regulation and the circuit precedent of *Sawyer. Jourdan v. Equitable Equipment Co.*, 29 BRBS 49 (1995) (order) (Brown, J., dissenting), *aff'd sub nom. Aetna Casualty & Surety Co. v. Director, OWCP*, 97 F.3d 815, 30 BRBS 81 (CRT)(5th Cir. 1996).

The Fifth Circuit held that the Board properly dismissed a party's appeal as premature because another party subsequently filed a timely motion for reconsideration before the administrative law judge. The court held that under 20 C.F.R. §802.206 when a party files a motion for reconsideration, any previously filed notice of appeal is nullified, and any party desiring Board review must wait until the motion for reconsideration has been resolved, and after the administrative law judge has filed his decision on reconsideration, before filing a new notice of appeal with the Board. *Aetna Casualty & Surety Co. v. Director, OWCP*, 97 F.3d 815, 30 BRBS 81(CRT) (5th Cir. 1996), *aff'g Jourdan v. Equitable Equipment Co.*, 29 BRBS 49 (1995) (order) (Brown, J., dissenting).

A motion for reconsideration directed to the administrative law judge must be timely to stay the running of the appeal period to the Board. As neither the regulations establishing procedures for hearings under the Act, 20 C.F.R. §702.331 *et seq.*, nor the general regulations applicable to DOL administrative law judges, 29 C.F.R. Part 18, addresses the timeliness of a motion for reconsideration, the Board is guided by its regulations, 20 C.F.R. Part 802, in determining the timeliness of an appeal to the Board where a motion for reconsideration is filed, and the administrative law judge's resort to FRCP 59(e) was unnecessary. Claimant's motion here was timely under the Board's regulations, and thus his appeal filed after the decision on reconsideration was filed was timely. There is no requirement for service on the parties before a motion for reconsideration is considered filed. *Bogdis v. Marine Terminals Corp.,* 23 BRBS 136 (1989).

The Board held that claimant's motion for reconsideration of the administrative law judge's decision was filed in a timely manner because it was filed within10 business days of the date the administrative law judge's decision was filed in the district director's office. Specifically, as the10-day limit for filing motions for reconsideration under the Board's regulation at 20 C.F.R. §802.206(a) is based on Rule 59(e) of the FRCP, and as Rule 6(a) of the FRCP applies to Rule 59(e) motions, and as the regulations at 29 C.F.R. Part 18 do not provide for motions for reconsideration before administrative law judge, the Board held that Rule 6(a) applies to the filing of a motion for reconsideration of an administrative law judge's decision for purposes of determining whether the tolling provision of 20 C.F.R. §802.206(a) applies. As claimant's motion to the administrative law judge in this case was timely, Section 802.206(a) applied to toll the time for filing the appeal to the Board; consequently, claimant's appeal to the Board was timely. *Galle v. Ingalls Shipbuilding, Inc.*, 33 BRBS 141 (1999), *aff'd sub nom. Galle v. Director, OWCP,* 246 F.3d 440, 35 BRBS 17(CRT)(5th Cir. 2001), *cert. denied*, 122 S.Ct. 479 (2001).

The Fifth Circuit affirmed the Board's determination that, as claimant's motion for reconsideration of the administrative law judge's decision was timely, the regulation at 20 C.F.R. §802.206(a) tolled the time for filing an appeal to the Board. According deference to the Director's interpretation of the regulations, the court held that the 10-day period for filing motions for reconsideration under Section 802.206(b)(1) must be calculated using the computation method set forth in Rule 6(a) of the FRCP, which excludes intermediate weekends and holidays. *Galle v. Director, OWCP,* 246 F.3d 440, 35 BRBS 17(CRT) (5th Cir. 2001), *aff'g Galle v. Ingalls Shipbuilding, Inc.,* 33 BRBS 141 (1999), *cert. denied*, 122 S.Ct. 479 (2001).

The Board held that it lacked jurisdiction to review the merits of the decision approving the settlement as claimant did not file an appeal to the Board within 30 days of the date the decision was filed, but only filed a timely appeal of the administrative law judge's refusal to grant claimant's motion for rescission. Moreover, claimant's motion to rescind the settlement agreement filed with the administrative law judge was not considered an appeal of his order approving the settlement under 20 C.F.R. §802.207(a)(2) as the motion was not a misdirected notice of appeal to the Board and did not evince an intent to seek Board review of the approved settlement but was directed to the administrative law judge, who ruled on it. Additionally, the Board held that it was not in the interest of justice to consider claimant's motion to rescind the settlement agreement as a timely appeal of the approval of the settlement in light of the policy favoring the finality of settlements. *Porter v. Kwajalein Services, Inc.*, 31 BRBS 112 (1997), *aff'd on recon.,* 32 BRBS 56 (1998), *aff'd sub nom. Porter v. Director, OWCP,* 176 F.3d 484 (9th Cir. 1999)(table), *cert. denied*, 120 S.Ct. 593 (1999).

The request for a hearing before an administrative law judge does not constitute a

notice of appeal to the Board. *Healy Tibbitts Builders, Inc. v. Cabral*, 201 F.3d 1090, 33 BRBS 209(CRT) (9th Cir. 2000), *cert. denied*, 121 S.Ct. 378 (2000).

21-1d

The Board held that as the administrative law judge acted upon the settlement agreement submitted by the parties within the statutory time-frame for approval directed by Section 8(i)(1), the language contained therein which provides for approval of a settlement agreement by operation of law "unless specifically disapproved within thirty days," is not applicable. The Board therefore rejected the Director's contention that employer's appeal is untimely, since in this case, the date of filing of the administrative law judge's decision by the district director, September 3, 1998, is the pertinent date for determining the timeliness of subsequent procedural actions taken by the parties, and employer's motion for reconsideration before the administrative law judge and appeal to the Board each fall within the statutory time-frames set out in the Act and the accompanying regulations, 33 U.S.C. §921; 20 C.F.R. §§702.350, 802.206(a). *Cochran v. Matson Terminals, Inc*., 33 BRBS 187 (1999).

The Board rejected an employer's request, made in a response brief, that claimant's appeal to the Board be dismissed because claimant did not file a timely Petition for Review and brief. In so doing, the Board reasoned that employer's motion had not been presented in a separate document, as is required by 20 C.F.R. §802.219(b), that it was unclear from the case file whether claimant's Petition for Review and brief had in fact not been filed in a timely fashion, and that the documents had been submitted "within a reasonable period of time." *Fuller v. Matson Terminals*, 24 BRBS 252 (1991).

The Board denied employer's "motion" to dismiss claimant's petition for review and brief as untimely, as that "motion" was included in employer's response brief and did not comply with Section 802.219(b) which requires motions to be made in separate documents. *Milam v. Mason Technologies*, 34 BRBS 168 (2000) (McGranery, J., dissenting on other grounds).

Since the 1984 Amendments to the Act do not apply in cases arising under the District of Columbia Workmen's Compensation Act, reconsideration *en banc* under Section 21(b)(5) is not available. Since the thirty-day time period for filing a motion for reconsideration is also contained in Section 21(b)(5), and the applicable regulation, 20 C.F.R. §802.407, provided at the time of the decision that such motions must be filed within 10 days of the Board's decision, the Director's motion was dismissed as untimely filed. (Section 802.407 was subsequently amended to allow 30 days for all motions for reconsideration and Section 801.301(d) notes the unavailability of *en banc* reconsideration in D.C. Act cases). *Higgins v. Hampshire Gardens Apts.*, 19 BRBS 192 (1987).

21-1e

Section 21(b) - Composition and Authority of Board

Grant of Authority

The Board has the authority to decide the constitutionality of the 1984 Amendments. It holds that retroactive application of the retiree provisions are constitutional. *Shaw v. Bath Iron Works Corp.*, 22 BRBS 73 (1989).

The Board denies claimant's motion to maintain his appeal on the Board's docket for 60 days beyond the one-year anniversary of the appeal, noting that Public Law 104-208 does not contain the election provision that was contained in Public Law 104-134. The Board notes, however, that it considers the one-year period to run from the date the last appeal is filed in a case. *Barker v. Bath Iron Works Corp.*, 30 BRBS 198 (1996) (order).

The Eleventh Circuit held that an administrative law judge's decision which was administratively affirmed by the Board without review pursuant to Public Law No. 104-134 under which the Department of Labor is prohibited from using appropriated funds after September 12, 1996, to review cases which had been pending for more than a year as of that date, is final and ripe for review by the appeals court. The court stated that Congress has the power to amend the substantive law governing review of these cases through an appropriations bill. *Donaldson v. Coastal Marine Contracting Corp.,* 116 F.3d 1449, 31 BRBS 70(CRT) (11th Cir. 1997).

The Fifth Circuit noted that the Act affords employer a full pre-deprivation, trial-type hearing before an administrative law judge, as well as a post-deprivation hearing in the Courts of Appeals. Consequently, the Fifth Circuit concludes that employer was not deprived of property without due process because of the administrative affirmance of the administrative law judge's decision, and thus, affirms the constitutionality of the "one-year legislation." *Shell Offshore v. Director, OWCP*, 122 F.3d 312, 31 BRBS 129(CRT) (5th Cir. 1997), *cert. denied*, ___ U.S. ___, 118 S.Ct. 1563 (1998); *see also Hall v. Consolidated Employment Systems, Inc.,* 139 F.3d 1025, 32 BRBS 91(CRT)(5th Cir. 1998); *Gooden v. Director, OWCP,* 135 F.3d 1066, 32 BRBS 59(CRT) (5th Cir. 1998).

The Ninth Circuit held that Public Law 104-134, which limits the time an appeal may remain pending before the Board to one year, does not violate the constitutional separation of powers principles. The court stated that the Board is a "constitutionally permissible adjunct tribunal" over which Congress has broad authority. Consequently, the court had jurisdiction to review the two cases before it. Moreover, the court held that Public Law 104-134 does not preclude a motion for reconsideration to the Board of a case which was administratively affirmed because it remained pending for over one year; therefore, a motion for reconsideration tolls the sixty-day period during which a party may appeal a case to the Circuit Court. Consequently, the court held that the appeals in these two cases were timely. *Ramey v. Stevedoring Services of America*, 134 F.3d 954, 31 BRBS 206(CRT) (9th Cir. 1998).

The D.C. Circuit held that the Omnibus Consolidated Rescissions and Appropriations Act, P.L. 104-134, is without effect on the District of Columbia Workmen's Compensation Act of 1928 inasmuch as since 1982 the D.C. Act may no longer be amended by cross-reference to the Longshore Act. *Washington Metropolitan Area Transit Authority v. Beynum*, 145 F.3d 371, 32 BRBS 104(CRT) (D.C. Cir. 1998).

The Eighth Circuit held that a delay of more than four years from the filing of employer's notice of appeal of the administrative law judge's decision to the issuance of the Board's Decision and Order was not unreasonable or a denial of due process where the delay resulted from employer's prior appeal to the Eighth Circuit of the Board's order denying employer's motion to stay and where the record had to be reconstructed upon appeal to the Board after the record was lost. *Meehan Service Seaway Co. v. Director, OWCP*, 125 F.3d 1163, 31 BRBS 114(CRT) (8th Cir. 1997), *cert. denied,* 118 S.Ct. 1301 (1998).

The Third Circuit held that by issuing a decision on September 12, 1996, more than three years after the Director filed an appeal, the Board was deprived of jurisdiction pursuant to Public Law 104-134. The court held that the language of the appropriations bills required the Board to act "before" Sept. 12 on any appeal pending for more than one year. The court held that the Board's delay caused its remand of the case to become a nullity, thereby making the administrative law judge's grant of Section 8(f) relief to employer a final order which the court had jurisdiction to review. *Director, OWCP v. Sun Ship, Inc.*, 150 F.3d 288, 32 BRBS 132(CRT) (3d Cir. 1998), *vacating Ehrentraut v. Sun Ship, Inc.*, 30 BRBS 146 (1996); *see also Burton v. Stevedoring Services of America*, 196 F.3d 1070, 33 BRBS 175(CRT) (9th Cir. (1999).

The automatic affirmance provision of Public Law 104-134 applies in cases brought under the Defense Base Act, due to provision of that Act incorporating the Longshore Act. *ITT Base Services v. Hickson*, 155 F.3d 1272, 32 BRBS 160(CRT)(11th Cir. 1998).

The Board rejected employer's contention and held that its decision on the merits was issued in a timely manner and in accordance with Public Law 104-134. Specifically, the Board stated that, within one year of the date of appeal, it dismissed employer's appeal of the administrative law judge's decision and remanded the case to the district director for reconstruction of the record. Thus, action was taken within the appropriate time limits. Upon receiving the reconstructed record, the Board then commenced a new one-year time limit, and it rendered a decision on the merits within that time. *McKnight v. Carolina Shipping Co.*, 32 BRBS 251 (1998), *aff'g on recon en banc* 32 BRBS 165 (1998).

In its motion for reconsideration, employer contended that, pursuant to the Appropriations Act of 1998, Pub. L. 105-78, the administrative law judge's decision was automatically affirmed on the one year anniversary date of the appeal's filing, the day the Board's decision was issued. Following a discussion focusing on, and comparing, the language and interpretation of the Appropriations Acts of 1996 and 1998, the Board's regulations, and relevant case law, the Board held that the one year time period begins to run on the day following the filing of an appeal; accordingly, in the instant case, the Board acted within the statutory time period. *Pascual v. First Marine Contractors, Inc.,*32 BRBS 289 (1999).

New Issues Raised on Appeal

See Section 28 of the Deskbook for cases addressing the requirement that objections to attorneys' fee petitions be raised before the administrative law judge or district director in the first instance.

Where claimant argued that the doctrine of laches applied based on the theory that employer recognized that his 1977 injury occurred by voluntarily paying compensation and by entering into a 1980 stipulation and agreement, the court affirmed the Board's decision that the issue was improperly raised for the first time on appeal and held that the Board properly refused to consider the argument. Goldsmith v. Director, OWCP, 838 F.2d 1079, 21 BRBS 27 (CRT) (9th Cir. 1988).

The Board holds that the Director may raise contentions for the first time on appeal where they allege erroneous legal determinations and effectively challenge only the administrative law judge's analysis of existing evidence. This is especially true where the liability of the Special Fund is at issue. *Stone v. Newport News Shipbuilding & Dry Dock Co.*, 20 BRBS 1 (1987).

The Board will not address an issue regarding subsequent supervening injury since employer did not raise the issue before the administrative law judge. Employer asserts the issue was raised during the formal hearing, but the record reveals that the parties merely offered evidence relevant to the issue. Harrison v. Todd Pacific Shipyards Corp., 21 BRBS 339 (1988).

The Board held that the Director was not precluded from raising for the first time on appeal an issue affected by statutory and regulatory amendments. An issue may be considered for the first time on appeal where a pertinent statute or regulation has been overlooked or when there is a change in law while the case is pending on appeal and the new law might materially alter the result. In this case, the issue involved whether the employer was prejudiced by claimant's failure to give timely notice pursuant to Section 12(d)(2), as amended in 1984. At the time of the administrative law judge's Decision, an interim regulation was in effect and the Board had issued its first decision in Sheek stating untimely notice could only be excused if employer had knowledge of the injury and was not prejudiced by the untimely notice. The Board subsequently held on reconsideration in Sheek that lack of prejudice alone will excuse untimely notice and the final regulation supported this holding. Bukovi v. Albina Engine/ Dillingham, 22 BRBS 97 (1988).

Since Section 14(e) provides for a mandatory assessment of additional compensation, it may be raised for the first time at any time. Scott v. Tug Mate, Inc., 22 BRBS 164 (1989).

Noting that it has consistently adhered to the longstanding principle that an issue cannot be presented initially when the case is on review, the Board held that employer could not raise the issues of situs and status under the Act for the first time in its appeal before the Board. Hite v. Dresser Guiberson Pumping, 22 BRBS 87 (1989).

The Board decided to address the issue of whether employer is entitled to a credit under Section 14(j), even though it was not raised before the administrative law judge. In cases arising within the Fifth Circuit, the Board will follow *Martinez v. Mathews,* 544 F.2d 1233 (5th Cir. 1976), and address an issue not raised below where a pure question of law is involved and a refusal to consider it would result in a miscarriage of justice. In this case, since Section 14(j) of the Act gives employer a statutory right to credit voluntary payments against subsequently found liability, and resolving the credit issue will not require new findings of fact, the issue can be considered for the first time on appeal. *Aurelio v. Louisiana Stevedores, Inc.,* 22 BRBS 418 (1989), *aff'd mem.*, No. 90-4135 (5th Cir. Mar. 5, 1991).

The Board declined to consider the commencement date of employer's liability for purposes of Section 8(f) relief as it was raised for the first time on appeal. *Shaw v. Todd Pacific Shipyards Corp.,* 23 BRBS 96 (1989).

The Board will not address employer's argument that claimant should be barred from recovery of medical benefits because of his failure to comply with Section 7(d) as it was raised for the first time on appeal. *Maples v. Texports Stevedores Co.*, 23 BRBS 302 (1990), *aff'd sub nom. Texports Stevedores Co. v. Director, OWCP*, 931 F.2d 331, 28 BRBS 1 (CRT) (5th Cir. 1991).

The Board refuses to allow employer to argue for the first time on appeal that claimant did not give timely notice of his cervical injury. Section 12(d)(3)(ii) requires a Section 12(d) defense to be raised at first hearing on the claim. The Board distinguishes facts of this case from *Bukovi*, 22 BRBS 97 (1988). The Board also rejects employer's contention that it should be permitted to raise Section 12 on appeal because at the time of the hearing, when it stipulated to having received timely notice, the law was contrary to *Addison,* 22 BRBS 32 (1989), and its contention that *Addison* changed the law to require claimant to file subsequent notice of each sequela of his work accident. *Alexander v. Ryan-Walsh Stevedoring Co., Inc.*, 23 BRBS 185 (1990), *vacated and remanded mem.,* 927 F.2d 599 (5th Cir. 1991).

The Board declined to address employer's argument that claimant did not properly or timely file a request for medical benefits, as this issue was not raised before the administrative law judge. *Boyd v. Ceres Terminals*, 30 BRBS 218 (1997).

When claimant's LS-18 does not list nature and extent of disability as a contested issue and his counsel twice stated at the hearing that he was seeking only temporary partial disability benefits, claimant is precluded from raising a claim for temporary total disability benefits on appeal. *Lobus v. I.T.O. Corp. of Baltimore, Inc.*, 24 BRBS 137 (1990).

The Board rejects employer's argument that the Director may not raise the Special Fund's entitlement to a Section 3(e) credit for the first time on appeal. The Director may raise this issue for the first time on appeal as the liability of the Special Fund is at issue, and the Director argues that a pertinent statutory provision has been overlooked. *Stewart v. Bath Iron Works Corp.*, 25 BRBS 151 (1991).

In response to a dissent, the majority notes that issues not raised before the Board will not be addressed *sua sponte* based upon errors uncovered during a review of the record. Absent plain error on the face of the decision only issues raised by the parties will be addressed. The majority thus declines to reverse the administrative law judge's award of a Section 14(e) penalty based on record evidence that employer timely controverted the claim. *Norwood v. Ingalls Shipbuilding, Inc.*, 26 BRBS 66 (1992) (Stage, C.J., dissenting).

Where counsel represents claimant and employer's insurance plan administrator, and claimant is unaware of counsel's possible conflict of interest until after he represents her, it is proper for her to raise the issue on appeal to the Board. The court holds that the issue was sufficiently raised before the Board, and thus states that the issue was not raised for the first time before it, and it remands the case for proceedings on the conflict and informed consent issues. *Smiley v. Director, OWCP*, 984 F.2d 278 (9th Cir. 1993), *superseding* 973 F.2d 1463, 26 BRBS 37 (CRT)(9th Cir. 1992).

The Board declined to address employer’s contention that claimant’s disability is the result of an intervening injury, as employer failed to first raise that issue before the administrative law judge. *Turk v. Eastern Shore Railroad, Inc.*, 34 BRBS 27 (2000).21

The Board addresses the issue of whether Section 9(g) of the Act violates a treaty between the United States and Greece, even though it is raised for the first time on appeal. The issue is purely one of law, and the Board states it is appropriate for it to address the issue. *Logara v. Jackson Engineering Co.*, 35 BRBS 83 (2001).

The Board denies claimant’s motion for reconsideration of its decision. On reconsideration, claimant raises issues that are not properly before the Board. One issue challenges the administrative law judge’s decision on remand and was initially raised in claimant’s response brief to the Director’s appeal, and not in a cross-appeal. The other two issues were not raised in an appeal after the administrative law judge’s decision on remand; the issues cannot be raised for the first time in motion for reconsideration. In any event, the issues relate to the administrative law judge’s initial decision, and the Board’s first decision in this case thus constitutes the law of the case. *Ravalli v. Pasha Maritime Services,* 36 BRBS 91 (2002), *denying recon. in* 36 BRBS 47

(2002).

The administrative law judge properly addressed claimant's pending Section 22 claim for a *de minimis* award when he addressed the later filed claim for additional temporary total disability benefits. Employer, in its motion for reconsideration to the administrative law judge did not contend that the administrative law judge erred in addressing this issue, but only that the medical evidence did not support a nominal award. Employer cannot contend for the first time on appeal that it was deprived of the right of additional discovery on the deteriorating nature of claimant's condition, although it can file a motion for modification. *Gillus v. Newport News Shipbuilding & Dry Dock Co.*, 37 BRBS 93 (2003), *aff'd mem.,* 84 Fed. Appx. 333 (4th Cir. 2004).

Inadequate Briefing

Where party is represented by counsel, mere assignment of error is insufficient to invoke Board Review. Counsel failed to cite any relevant law or identify any error in administrative law judge's consideration of the evidence; the Board therefore held counsel had failed to raise a substantial issue for review and affirmed the decision below. Carnegie v. C & P Telephone Co., 19 BRBS 57 (1986).

The Board declined to address a Section 8(i) issue which had been inadequately briefed. Nordahl v. Oceanic Butler, Inc., 20 BRBS 18 (1987), aff'd, 842 F.2d 773, 21 BRBS 33 (CRT) (5th Cir. 1988).

The Board declines to address issues where the party's brief fails to contain a discussion of the relevant law and evidence supporting its contentions. Shoemaker v. Schiavone and Sons, Inc., 20 BRBS 214 (1988).

The Board declines to address a challenge to the administrative law judge's imposition of a Section 14(f) penalty where the issue is inadequately briefed. *West v. Washington Metropolitan Area Transit Authority*, 21 BRBS 125 (1988).

Pursuant to the 33 U.S.C. §921(b)(3) and 20 C.F.R. §802.211(a), (b), the Board holds that where claimant merely files a copy of a post-hearing brief as a petition for review and brief, without addressing the Decision and Order or identifying errors committed by the administrative law judge, the decision of the administrative law judge below must be affirmed, as claimant has failed to raise a substantial issue for the Board to review. *Collins v. Oceanic Butler, Inc.*, 23 BRBS 227 (1990).

The Board held that a one-sentence "argument" which cites a single authority does not constitute adequate briefing of an issue raised on appeal, as the Board would have to extrapolated the argument and conclusion therefrom. Therefore, the Board held on reconsideration that the panel properly declined to address the issue in its decision. However, for the sake of clarification, the Board, *en banc*, stated that employer is liable

to claimant for all medical expenses related to the injury paid by claimant and is liable for all medical expenses related to the injury paid by claimant's private health insurer, provided the private insurer files a claim for reimbursement of same. *Plappert v. Marine Corps Exchange*, 31 BRBS 109 (1997), *aff'g on recon. en banc* 31 BRBS 13 (1997).

Issues Raised in Response Brief

Applying the "inveterate and certain" rule, the Third Circuit held that where an appellee's contention provides an alternate avenue to a prior favorable judgment, the Board must address that contention even if not raised in a cross-appeal. Accordingly, the case was remanded to the Board. Dalle Tezze v. Director, OWCP, 814 F.2d 129, 10 BLR 2-62 (3d Cir. 1987) (black lung case).

The Board held that it could not consider the merits of the Director's contention regarding the applicability of the Section 8(f)(3) bar as it is raised in a response brief. Specifically, the Board held that inasmuch as the Director, in forwarding his alternate rationale for supporting the administrative law judge's ultimate denial of Section 8(f) relief on the grounds of the prior mental condition, is contesting the administrative law judge's adverse finding regarding the absolute defense at Section 8(f)(3), and since consideration of the Director's contention would require remand, and thus, will not maintain the *status quo* of the administrative law judge's decision, his contention should have been raised in a timely filed cross-appeal. *Farrell v. Norfolk Shipbuilding & Dry Dock Corp., 32* BRBS 118, *vacated on recon.,* 32 BRBS 283 (1998).

The Board granted reconsideration, and held that the Director's contention, raised in his response brief, that the absolute defense of Section 8(f)(3) is applicable, must be addressed as it supports the administrative law judge's ultimate denial of employer's request for Section 8(f) relief. The Board thus vacated its prior decision to the extent that it required the Director to have filed a cross-appeal to preserve this issue. Citing *Dalle Tezze*, 814 F.2d 129, 10 BLR 2-62 (3d Cir. 1987), and *Malcomb*, 15 F.3d 364, 18 BLR 2-113 (4th Cir. 1994), the Board further noted that it is irrelevant that consideration of the Director's contention would require remand, as acceptance of his position by the administrative law judge would maintain the *status quo* of the administrative law judge's decision. *Farrell v. Norfolk Shipbuilding & Dry Dock Corp.*, 32 BRBS 283 (1998), *modifying on recon.* 32 BRBS 118 (1998).

The Board will not address a claimant's request for a Section 14(f) penalty, as it was raised only in his response brief and not via a cross-appeal. *Castronova v. General Dynamics Corp.*, 20 BRBS 139 (1987).

The Board declines to address a contention raised in a response brief challenging the administrative law judge's findings regarding Section 33(g), since such a contention should be raised in a cross-appeal. *Shoemaker v. Schiavone & Sons, Inc.*, 20 BRBS 214 (1988).

The Board reiterates that it will not address issues raised in a response brief which challenge the administrative law judge's findings as such arguments must be raised in a cross-appeal. *Garcia v. National Steel & Shipbuilding Co.,* 21 BRBS 314 (1988).

Where claimant appealed that portion of administrative law judge's decision regarding a Section 33(f) credit and employer did not file a cross appeal of the administrative law judge's Section 33(g) finding, the Board declined to consider employer's arguments on that issue. *Briscoe v. American Cyanamid Corp.*, 22 BRBS 389 (1989).

The Board rejected an employer's request, made in a response brief, that claimant's appeal to the Board be dismissed because claimant did not file a timely Petition for Review and brief. In so doing, the Board reasoned that employer's motion had not been presented in a separate document, as is required by 20 C.F.R. §802.219(b), that it was unclear from the case file whether the claimant's Petition for Review and brief had in fact not been filed in a timely fashion, and that the documents had been submitted "within a reasonable period of time." *Fuller v. Matson Terminals*, 24 BRBS 252 (1991).

Claimant's failure to respond to one of employer's arguments on appeal does not constitute an admission, as the Board is not bound by technical rules of appellate pleading and procedure. *Formoso v. Tracor Marine, Inc.*, 29 BRBS 105 (1995).

Where the district court imposed a Section 14(f) penalty on employer but denied the claimant fees, costs and interest, the Second Circuit declined to consider the claimant's renewed request for fees, costs and interest, as it was made in response to the employer's appeal and not on cross-appeal. *Burgo v. General Dynamics Corp.*, 122 F.3d 140, 31 BRBS 97(CRT) (2d Cir. 1997), *cert. denied*, 523 U.S. 1136 (1998).

The Board denies claimant's motion for reconsideration of its decision. On reconsideration, claimant raises issues that are not properly before the Board. One issue challenges the administrative law judge's decision on remand and was initially raised in claimant's response brief to the Director's appeal, and not in a cross-appeal. The other two issues were not raised in an appeal after the administrative law judge's decision on remand; the issues cannot be raised for the first time in motion for reconsideration. In any event, the issues relate to the administrative law judge's initial decision, and the Board's first decision in this case thus constitutes the law of the case. *Ravalli v. Pasha Maritime Services,* 36 BRBS 91 (2002), *denying recon. in* 36 BRBS 47 (2002).

The Board may address an issue raised in a response brief that provides an alternate avenue of affirming the administrative law judge's decision. In this case, the Board addresses, but rejects, the contention that collateral estoppel effect should be given to the findings of the state workers' compensation board. *Reed v. Bath Iron Works Corp.*, 38 BRBS 1 (2004).

Interlocutory Appeals

Although the administrative law judge did not enter a final award after finding that claimant is covered by the D.C. Act, the Board entertained employer's appeal in the interest of judicial economy. *Williams v. Whiting Turner Contracting Co.*, 19 BRBS 33 (1986).

Although interlocutory review is not generally granted in cases involving discovery orders or incomplete decisions, the Board granted review in this case, as extraordinary circumstances were present, based on the administrative law judge's failure to permit a medical provider-intervenor the opportunity to respond to employer's Motion to Compel. The hospital's due process rights were collateral to the merits, and redress of their denial would have been impossible on appeal of merits of the case. *Niazy v. The Capital Hilton Hotel,* 19 BRBS 266 (1987).

In a case where the parties tried only the issue of coverage before the administrative law judge and stated that other issues could be resolved by agreement once coverage was decided, the Board granted review despite the lack of a final order. The Board noted that, in order to avoid piecemeal review, the administrative law judge should obtain the facts necessary to resolve all issues prior to deciding the issue of jurisdiction so that a single compensation order may issue. *Jackson v. Straus Systems, Inc.*, 21 BRBS 266 (1988).

Where administrative law judge addressed only issues of status and situs, the Board granted review of those issues in fairness to the parties as employer's appeal had been pending since 1986, but noted that the appeal is interlocutory and that the Board ordinarily does not accept interlocutory appeals. *Caldwell v. Universal Maritime Service Corp.,* 22 BRBS 398 (1989).

Board accepts interlocutory appeal of administrative law judge's order disqualifying counsel from representing claimant in the instant case, inasmuch as appeal had been pending since 1986 and Board will accept interlocutory appeals where necessary to direct the proper course of litigation. Board held administrative law judge abused his discretion in disqualifying counsel. *Baroumes v. Eagle Marine Services,* 23 BRBS 80 (1989).

The Board sets forth the limited circumstances in which it will accept an interlocutory appeal, namely when it is necessary to properly direct the course of the adjudicative process, or if the collateral order doctrine applies. In the instant case, since the administrative law judge did not purport to resolve the controversy between the parties but rather, after addressing the only issue of jurisdiction under the Act, remanded the case to the deputy commissioner for further proceedings, the administrative law judge's Order is not final. As no exceptions to the rule against taking appeals of interlocutory orders apply, the Board dismissed employer's appeal. *Arjona v. Interport Maintenance*, 24 BRBS 222 (1991).

The Board dismisses claimant's appeal of the administrative law judge's order denying recusal, as it is not an appeal of a final order, and does not fall within the exceptions for taking such an appeal: (1) the order must conclusively resolve the disputed question; (2) the order must resolve an important issue completely separate from the merits of the

action; and (3) the order must be effectively unreviewable on appeal from a final judgment. *Hartley v. Jacksonville Shipyards, Inc.*, 28 BRBS 100 (1994).

The Board rejected the Director's motion to dismiss the appeal because it is taken from a non-final order, since the Board is not bound by technical rules of procedure, 33 U.S.C. §923(a), and the significance of the issue at hand, *i.e.*, whether active duty military personnel working off-duty at an NFIA entity are excluded from coverage, warrants consideration of employer's appeal. *Hardgrove v. Coast Guard Exchange System*, 37 BRBS 21 (2003).

The administrative law judge's Order Compelling Discovery did not satisfy the three-pronged test that would bring it under the collateral order exception to the final judgment rule articulated by the Supreme Court in *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271 (1988): the order noes not resolve an important issue totally separate from the merits of the action because it relates to the credibility of evidence relevant to the merits of the case, and the order will not be "effectively unreviewable" on appeal from a final judgment, as employer may appeal the final fee award. Nor does the danger of denying justice in this case outweigh the inconvenience and cost of piecemeal review. Finally, employer's argument that the Board should accept the appeal to properly direct the course of the adjudicatory process is rejected, as discovery need not be uniformly conducted because each administrative law judge has broad discretion in such matters. *Butler v. Ingalls Shipbuilding, Inc.*, 28 BRBS 114 (1994).

In this case, the administrative law judge did not resolve the controversy between the parties (whether Section 33(g) bars claims for medical benefits), but instead denied employer's motion for summary judgment and remanded the case to the district director for further development of the case; thus, the Board held that the administrative law judge's Decision and Order was not final. No exceptions to the rule against taking appeals of interlocutory orders applies in this case. The Board need not direct the course of the adjudicative process, and the collateral order doctrine does not apply as employer is seeking to foreclose all future entitlement to medical benefits on the merits. Thus, the employer's appeals were dismissed. *Green v. Ingalls Shipbuilding, Inc.*, 29 BRBS 81 (1995).

The Board dismissed the Director's appeal of the administrative law judge's Motion to Compel Depositions as interlocutory. The administrative law judge ordered the district director and a claims examiner to be available for depositions concerning procedures involving Section 8(f) applications. The order was not collateral to the merits of the case, the Director did not raise any due process or privileged information defenses, the order is not unreviewable upon final judgment and it is not necessary for the Board to direct the course of litigation inasmuch as the Director's contentions relate to the relevancy of the information to be discovered and not to its admissibility. *Tignor v. Newport News Shipbuilding & Dry Dock Co.*, 29 BRBS 135 (1995).

The Board dismisses employer's interlocutory appeal, as the order appealed from does not satisfy the requirements of the collateral order doctrine and as employer did not raise any due process considerations. The administrative law judge issued an order granting claimant's motion to compel discovery of the names and addresses of the companies identified by employer's vocational expert as potential suitable alternate employment. A discovery order such as this is reviewable after a final decision is issued, and employer did not contend that the matters to be discovered are privileged materials. Employer's bare contention of "undue hardship" is rejected. *Newton v. P&O Ports Louisiana, Inc.*, 38 BRBS 23 (2004).

Where the administrative law judge issued an interlocutory order, issues addressed therein are not barred from the Board's consideration by the failure to appeal that order. Rather, the issues may be raised on appeal of the final order, and the Board is not bound by statements made in the interlocutory order. Here, in his non-final order, the administrative law judge identified the disputed issue of responsible carrier, and he declined to dismiss employer from the case, stating that a carrier would be liable for benefits, but he did not resolve any issue of the case. Thus, on appeal from the final order, the Board properly addressed the issue of responsible carrier. *Weber v. S.C. Loveland Co.*, 35 BRBS 190 (2002), *aff'g and modifying on recon.* 35 BRBS 75 (2001).

Standing

Employer lacks standing to appeal to the Board from denial of benefits based on finding that an injury is not work-related, which opened up a possibility of suit in tort against employer, because it is not an aggrieved party. Sharpe v. George Washington University, 18 BRBS 102 (1986).

The Board grants intervenors' motion for reconsideration of the Board's Order dismissing their appeal. Under 20 C.F.R. §802.201(a), intervenors are "adversely affected or aggrieved" as they showed that they were "injured in fact by agency action and that the interest [they] seek to vindicate is arguably within the 'zone of interests to be protected or regulated by the statute.'" Intervenors contended that they were entitled to a declaration of tort immunity under Section 33 of the Act irrespective of the dismissal of claimant's claim. The Board reinstates intervenors' appeal, but ultimately denies relief on the merits. *Hymel v. McDermott, Inc.*, 37 BRBS 160 (2003).

The Director may appeal an administrative law judge's Section 8(f) findings even if he did not participate at the hearing. Truitt v. Newport News Shipbuilding & Dry Dock Co., 20 BRBS 79 (1987).

The Director ordinarily has standing to appeal any case to the Board whenever an erroneous legal or factual determination is alleged, even though the Director did not participate at the administrative law judge level. The Board granted the Director's Motion for Reconsideration despite the fact that was his first participation in the case, noting that he raised a novel issue, but stating that his initial participation might have obviated the need for further proceedings. *Brown v. Bethlehem Steel Corp.*, 20 BRBS 26 (1987), *aff'g on recon.* 19 BRBS 200 (1987), *aff'd in part and rev'd in part sub nom. Director, OWCP v. Bethlehem Steel Corp.*, 868 F.2d 759, 22 BRBS 47 (CRT)(5th Cir. 1989).

The Board declines to place the Director in the caption and attorney appearance listing in Longshore Act cases wherein he has not filed a timely pleading and where Section 8(f) is not an issue. The Board also holds that the Director did not timely appear before the Board where the Board notified the parties that it was holding oral argument, instructed the parties to file a statement of their positions with supporting authority at least fifteen calendar days prior to the argument, and where the Director filed its statement of position fourteen days before the argument. *Thompson v. Potashnik Construction*, 21 BRBS 63 (1988) (Order on Recon.) (McGranery, J., dissenting).

In a footnote, the Board declined to consider claimant's contentions pertaining to a Section 8(f) determination, because claimant's possess no cognizable interest in dispositions of requests for Section 8(f) relief. *Coats v. Newport News Shipbuilding & Dry Dock Co.,* 21 BRBS 77 (1988).

The Director, as a party-in-interest, has standing to raise the issue of whether claimant is entitled to benefits for a siderosis claim, despite a purported settlement, as it affects the proper administration of the Act. Moreover, claimant, in effect, raised the issue also. *O'Berry v. Jacksonville Shipyards, Inc.*, 21 BRBS 355 (1988), *aff'd and modified on recon.*, 22 BRBS 430 (1989).

The Board stated that the Director has standing to appeal an administrative law judge's findings regarding onset and extent of a retiree's permanent partial disability benefits. The Director may raise issues for the first time on appeal, especially when the liability of the Special Fund is at issue, where the Director's contentions allege erroneous legal determinations and effectively challenge only the administrative law judge's analysis of existing evidence. Employer's contention that, pursuant to 29 C.F.R. §18.20, the Director's standing on appeal is limited due to the Director's failure to respond to a requests for admission that decedent had a 50% permanent partial disability. The Rules of Practice and Procedure before the Office of Administrative Law Judges, 29 C.F.R. Part 18, are superseded to the extent they are inconsistent with a rule of special application as provided by statute or regulation. Adams v. Newport News Shipbuilding & Dry Dock Co., 22 BRBS 78 (1989).

The Director has standing to move for reconsideration despite a failure to participate in the initial appeal where issues properly the subject of a motion for reconsideration are raised. In the instant case, the Board addressed the Director's objections to its Section 33 holding, since it was a subject of employer's appeal. The Board, however, declined to address the Director's Section 10(f) argument, since no party appealed the absence of findings by the administrative law judge concerning claimant's entitlement to Section 10(f) adjustments. *Mills v. Marine Repair Service,* 22 BRBS 335 (1989), *modifying in part on recon.* 21 BRBS 115 (1988).

The Board rejects employer's contention that the Director may not appeal the administrative law judge's decision on remand because he did not participate before the administrative law judge or the Board in the original appeal. The Director's objections are not untimely because this is the first opportunity to allege error in the administrative law judge's decision on remand, and he raises the same issue addressed by employer in its original appeal. *Randolph v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 443 (1989).

Rejecting the Director's contention that the appeal lacked ripeness since employer had yet to be "adversely affected or aggrieved" under 20 C.F.R. §802.201(a), the Board stated that employer was adversely affected by the district director's denial of its right to have the case referred for a hearing. *Eneberg v. Todd Pacific Shipyards*, 30 BRBS 59(1996) (McGranery, J., dissenting on other grounds).

Employer filed a motion to dismiss the Director as a party, contending that pursuant to the Supreme Court's decision in *Harcum*, 514 U.S. 122, 115 S.Ct. 1278, 29 BRBS 87 (CRT)(1995), the Director has no standing to appear as an independent party in a claim under the Act. In denying employer's motion, the Board noted that in *Harcum*, the Court concluded that the Director was not "a person adversely affected or aggrieved" under Section 21(c) in that case and thus, lacked standing to appeal a decision by the Board to the appropriate United States court of appeals pursuant to that subsection of the Act. The instant case involved the appeal of an administrative law judge's decision to the Board under Section 21(b)(3), which authorizes the Board "to hear and determine appeals . . . taken by any party in interest . . ." 33 U.S.C. §921(b)(3). Pursuant to the Board's regulations, the Director has standing to appeal or to respond to an appeal before the Board as a party-in-interest. 20 C.F.R. §§802.201(a), 802.212; *see also* 20 C.F.R. §801.2(a)(10). *Ahl v. Maxon Marine, Inc.*, 29 BRBS 125 (1995) (order).

The Board rejects employer's contention that the Director's appeal should have been dismissed pursuant to *Harcum*, 115 S.Ct. 1278, 29 BRBS 87(CRT) (1995), as Section 21(b)(3) permits appeals by any "party in interest" while Section 21(c) limits appeals to the circuit courts to "persons adversely affected or aggrieved." *Renfroe v. Ingalls Shipbuilding, Inc.*, 30 BRBS 101, 104 (1996) (*en banc*).

Substantial Question of Law or Fact

The Board vacated as premature the administrative law judge's findings concerning the proper method of calculating the amount of employer's Section 33(f) setoff against any possible future third-party settlement. Inasmuch as there had not yet been any settlements to credit, the issue is not ripe for adjudication. *Chavez v. Todd Shipyards Corp.*, 24 BRBS 71 (1990), *rev'd in pert. part sub nom. Chavez v. Director, OWCP*, 961 F.2d 1409, 25 BRBS 134 (CRT)(9th Cir. 1992).

The Ninth Circuit reversed the Board's determination that the Section 33(f) apportionment issue was not ripe because no settlement had been executed between claimant and the third-parties. The court stated that the uncertainty in the apportionment question created a practical hardship for both parties preventing an execution of a settlement. Thus, the matter met the traditional standard for determining ripeness, and the court remanded the case to the Board for consideration of the parties' theories of apportionment. *Chavez v. Director, OWCP*, 961 F.2d 1409, 25 BRBS 134 (CRT)(9th Cir. 1992), *rev'g in pert part. Chavez v. Todd Shipyards Corp.*, 24 BRBS 71 (1990).

The Fifth Circuit reversed the Board's dismissal of employer's appeal for lack of ripeness. The court held that the district director was without authority to act of claimants' motions to withdraw after employer had requested that the cases be referred to OALJ. This error was not harmless as the district director's action stripped employer of the valuable procedural right of having the cases adjudicated by an administrative law judge. The court noted that an administrative law judge can act on a motion to withdraw within adjudicative procedures. The court thus vacated the district director's orders, and remanded the cases for further proceedings. *Ingalls Shipbuilding, Inc. v. Director, OWCP,* 102 F.3d 1385, 31 BRBS 1 (CRT), *vacating on reh'g* 81 F.3d 561, 30 BRBS 39(CRT) (5th Cir. 1996) (reaching same result under a mandamus order later determined to be inapplicable to the cases on appeal), *rev'g Boone v. Ingalls Shipbuilding, Inc.*, 28 BRBS 119 (1994) (*en banc*)(Brown, J., concurring), *aff'g on recon.* 27 BRBS 250 (1993) (Brown, J., concurring).

The Board dismisses employer's appeal of the district director's order granting, without prejudice, claimant's request to withdraw his claim, holding that there is no controversy ripe for adjudication. Employer will not be adversely affected or aggrieved unless or until a new claim is filed, and its attempt to have the claims barred by Section 33(g) is not ripe for adjudication. *Boone v. Ingalls Shipbuilding, Inc.*, 27 BRBS 250 (1993)(*order en banc*) (Brown, J., concurring), *aff'd on recon. en banc*, 28 BRBS 119 (1994) (Brown, J., concurring), *rev'd sub nom. Ingalls Shipbuilding, Inc. v. Director, OWCP*, 102 F.3d 1385, 31 BRBS 1 (CRT), *vacating on reh'g* 81 F.3d 561, 30 BRBS 39 (CRT)(5th Cir. 1996); *Crandle v. Ingalls Shipbuilding, Inc.*, 27 BRBS 248 (1993) (*order en banc*)(Brown, J., concurring) (appeal additionally dismissed as untimely).

In a case where claimant and employer settled a claim in 1985, but left the issue of medical benefits open, and claimant has not yet filed a claim for medical benefits, the Board affirmed the administrative law judge's finding that the issue of whether Section 33(g) bars a future claim for medical benefits is premature. The Board held that where no claim has been filed, there are no issues to address and the case is not ripe for adjudication. The Board distinguished this case from *Chavez,* 961 F.2d 1409, 25 BRBS 134 (CRT) (9th Cir. 1992), by noting the "traditional ripeness analysis" and determining that the dismissal of a non-existent claim, the issue raised by employer in this case, presents neither an issue fit for review nor a hardship which outweighs the interest in postponing adjudication until an actual claim is filed. Therefore, the issue is not ripe for adjudication. *Parker v. Ingalls Shipbuilding, Inc.*, 28 BRBS 339 (1994).

In a case claimant and employer settled a claim in 1983, but left the issue of medical benefits open, and claimant later died without having filed a claim for medical benefits, and claimant's survivors did not file a timely claim for death benefits, the Board affirmed the administrative law judge's finding that the issue of whether employer can be held liable for additional benefits is moot. The Board held that where no claim has been filed, there are no issues to address; therefore, the Section 33(g) issues raised by employer in this case are not ripe for adjudication. *Deakle v. Ingalls Shipbuilding, Inc.*, 28 BRBS 343 (1994).

21-13l

In this case, the claimants had settled their claims for compensation and there is no evidence of record that they had requested medical benefits. The Board held that *Parker*, 28 BRBS 339 (1994), is dispositive of employer's claim that the Section 33(g) issue is ripe, as there are no claims pending and no issues to decide. *Green v. Ingalls Shipbuilding, Inc.*, 29 BRBS 81 (1995).

Direct Appeals From Deputy Commissioner to Board

Updated citation: Rucker v. Lawrence Mangum & Sons, Inc., 18 BRBS 74 (1986), rev'd in part, 830 F.2d 1188 (D.C. Cir. 1987)(table).

The Board holds that the administrative law judge erred in remanding to the deputy commissioner so that a direct appeal to the Board on the issue of Section 8(f) relief could be taken. The administrative law judge abdicated his responsibility to resolve disputed issues by remanding the case without making the required factual findings regarding claimant's entitlement as well as the applicability of Section 8(f) and liability of the Special Fund. Champagne v. Main Iron Works, Inc., 20 BRBS 84 (1987).

The Board dismisses an appeal of an assistant deputy commissioner's Order for lack of jurisdiction, reasoning that review of assistant deputy commissioner's assessment of a Section 30(e) penalty will involve factual determinations and that the case should thus be referred to an administrative law judge rather than appealed to the Board. Anweiler v. Avondale Shipyards, Inc., 21 BRBS 271 (1988).

The Board holds that where employer has voluntarily paid both the compensation and Section 14(f) penalty and there is no basis for district court enforcement proceedings under Section 18(a), the question of whether a Section 14(f) assessment is proper raises an issue of law which the Board may properly hear and decided on appeal. *Jennings v. Sea-Land Service, Inc.*, 23 BRBS 12 (1989), *vacated on other grounds on recon.,* 23 BRBS 312 (1990).

The Board has jurisdiction over an order of a deputy commissioner in cases involving only a question of law regarding the propriety of a Section 14(f) penalty and not requiring Section 18 enforcement. *McCrady v. Stevedoring Services of America*, 23 BRBS 106 (1989).

The Board has jurisdiction over an appeal where the deputy commissioner denies a Section 14(f) penalty, as Section 18 does not apply where no default order is issued. *Durham v. Embassy Dairy*, 19 BRBS 105 (1986).

The Board vacates the administrative law judge's order that the Special Fund is liable for claimant's rehabilitation expenses, as it holds that the Secretary, through the deputy commissioner, must make this determination, and that such a determination is directly appealable to the Board as it is a discretionary act. *Cooper v. Todd Pacific Shipyards Corp.*, 22 BRBS 37 (1989).

The Board stated that this case denying rehabilitation services was properly appealed to the Board in the first instance directly from the deputy commissioner, as none of the parties in the instant case challenges the Board's jurisdiction. The Board also noted that the Board's taking this appeal is consistent with the Board's caselaw and the position of the Director. *Olsen v. General Engineering & Machine Works*, 25 BRBS 169 (1991).

The Board rejected employer's assertion that it was denied due process because it was not permitted a hearing on the question of whether claimant was entitled to vocational rehabilitation. Contrary to employer's assertion, the district director did not err in not transferring the case to OALJ upon employer's request. Rather, because the Act gives the Secretary of Labor the authority to provide and direct vocational rehabilitation, the authority is wielded by the district directors and is discretionary. Thus, administrative law judges have no authority to determine the propriety of vocational rehabilitation, and it was appropriate for the district director to retain the case. Moreover, employer was not denied constitutional due process because, prior to assessing liability for total disability benefits during the period of rehabilitation, employer was afforded a full hearing on this issue. With regard to implementation of the vocational program, the Board notes that the employer has the right to appeal directly to the Board the district director's implementation of a plan. *Castro v. General Constr. Co.*, 37 BRBS 65 (2003).

The Board holds that only the Secretary, through the district director, has the authority to make determinations under Section 7(d)(2), and that such findings are directly appealable to the Board, even though the practical effect of this holding may be to bifurcate cases. *Toyer v. Bethlehem Steel Corp.*, 28 BRBS 347 (1994) (McGranery, J., dissenting).

In an appeal taken from the district director's Supplementary Compensation Order, the majority holds that the Board has jurisdiction to decide the appeal inasmuch as the district director's order involved only a question of law regarding the propriety of a Section 14(f) penalty. In response to the dissenting opinions, the majority noted that a hearing before an administrative law judge was not requested in the instant matter, and that resolution of the issue presented required only a legal interpretation of the 10-day time limit contained in Section 14(f), and did not require any factual determinations with regard to time of filing, time of payment or method of proof. Moreover, the Board's regulation, 20 C.F.R. §802.201(a), permits an aggrieved party to appeal a decision of the district director to the Board. *Brown v. Marine Terminals Corp.*, 30 BRBS 29 (1996) (*en banc*) (Brown and McGranery, JJ., concurring and dissenting).

21-13mm

In a case where the Board accepted employer's appeal of the district director's denial of its request to refer the case for a hearing before an administrative law judge, the majority reaffirmed its authority to accept direct appeals from the district director that raise a purely legal issue and rejects the dissenting opinion that the Board's remand order is tantamount to an order of mandamus. *Eneberg v. Todd Pacific Shipyards*, 30 BRBS 57 (1996) (McGranery, J., dissenting).

The Board held that the district director's authority to change claimant's treating physician under Section 7(b) is discretionary. Consequently, a direct appeal to the Board for review under the abuse of discretion standard was proper, and the Board rejected claimant's contention that the case belongs before the OALJ. *Jackson v. Universal Maritime Service Corp.*, 31 BRBS 103 (1997) (Brown, J., concurring).

The Ninth Circuit held that not all decision-making by the district directors is subject to a hearing before the administrative law judge. Section 19 (d) does not establish an absolute right to a hearing before an administrative law judge; thus, purely legal disputes or those that do not require fact-finding are not within the jurisdiction of the OALJ. A district director's attorney's fee award is directly appealable to the Board if there are no disputed facts. *Healy Tibbitts Builders, Inc. v. Cabral*, 201 F.3d 1090, 33 BRBS 209(CRT) (9th Cir. 2000), *cert. denied*, 531U.S. 956 (2000).

Scope of Review

An administrative law judge's interlocutory order is subject to review by the Board after a final decision on the claim has been issued and appealed. The Board follows rulings by the federal appellate courts which have assumed jurisdiction pursuant to Section 704 of the APA to review "preliminary, procedural or intermediate" agency actions which become subject on the review of final decisions. *Rochester v. George Washington University*, 30 BRBS 233 (1997).

Where claimant's notice of appeal was of only the administrative law judge's Decision and Order, the Board disregards claimant's contentions pertaining to the deputy commissioner's award of an attorney's fee. Leon v. Todd Shipyards Co., 21 BRBS 190 (1988).

The Board remands for the administrative law judge to make explicit findings, stating that the absence thereof makes the decision unreviewable. The Board also discusses the administrative law judge's mischaracterization of certain testimony, noting that it is not bound to accept an ultimate finding if the decision discloses that it was reached in an invalid manner. Cairns v. Matson Terminals, Inc., 21 BRBS 252 (1988).

Claimant did not circumvent proper appellate procedure by simultaneously appealing to the Board and requesting Section 22 modification before the administrative law judge, as the Board may not consider new evidence. Wynn v. Clevenger Corp., 21 BRBS 290 (1988).

The Second Circuit held that the Board exceeded its scope of review by engaging in fact-finding and making assumptions regarding claimant's post-injury average weekly wage. The case should have been remanded, as it is the role of the administrative law judge, not the Board, to consider the Section 8(h) factors to determine whether there was a loss of residual earning capacity. *LaFaille v. Benefits Review Board,* 884 F.2d 54, 22 BRBS 108 (CRT) (2d Cir. 1989), *rev'g LaFaille v. General Dynamics Corp.*, 18 BRBS 88 (1986).

The propriety of the deputy commissioner's granting of an "excuse" to employer under Section 14(e) is properly before the Board as the administrative law judge declined to reach the issue, and claimant timely appealed the administrative law judge's decision. *Fairley v. Ingalls Shipbuilding, Inc.*, 22 BRBS 184 (1989), *aff'd in pert. part and rev'd on other grounds sub nom. Ingalls Shipbuilding, Inc. v. Director, OWCP*, 898 F.2d 1088, 23 BRBS 61 (CRT) (5th Cir. 1990).

The administrative law judge is not obligated to rule in favor of a party simply because his medical experts are more numerous or more highly trained. The administrative law judge is a fact-finder and is entitled to consider all credible inferences. He can accept any part of an expert's testimony, or he may reject it completely. *Avondale Shipyards, Inc. v. Kennel*, 914 F.2d 88, 24 BRBS 46 (CRT) (5th Cir. 1990).

The Board is not required to follow a state court decision in a case interpreting a state statute with a burden of proof for establishing total disability that differs from that of the Act. *Rivera v. United Masonry, Inc.*, 24 BRBS 78 (1990), *aff'd*, 948 F.2d 774, 25 BRBS 51 (CRT)(D.C. Cir. 1991).

The D.C. Circuit held that where the administrative law judge denied benefits on the ground that a claim was time-barred, the Board exceeded its scope of review in affirming the administrative law judge's denial on the basis of lack of causation, with regard to which the administrative law judge made no findings. *Brown v. I.T.T./Continental Baking Co.*, 921 F.2d 289, 24 BRBS 75 (CRT) (D.C. Cir. 1990).

To resolve a statutory interpretation dispute of first impression, the Board first must determine whether Congress, in promulgating the Act, directly addressed the precise issue in dispute. The Board holds that it must give effect to unambiguously expressed congressional intent. *Stewart v. Bath Iron Works Corp.*, 25 BRBS 151 (1991).

The Board affirmed the administrative law judge's finding that claimant's injury is work-related, as the administrative law judge rationally found alleged discrepancies in the evidence to be insignificant. Employer failed to establish that the credibility determinations are irrational. *Simonds v. Pittman Mechanical Contractors, Inc.*, 27 BRBS 120 (1993), *aff'd sub nom. Pittman Mechanical Contractors, Inc. v. Director, OWCP*, 35 F.3d 122, 28 BRBS 89 (CRT) (4th Cir. 1994).

The Board does not have the authority to engage in *de novo* review of the evidence, nor may the Board substitute its credibility determinations for those of the administrative law judge. The administrative law judge is free to disregard parts of some witnesses' testimony while crediting other parts of their testimony. In this case, the administrative law judge's crediting of testimony that claimant's elbow is constantly painful and his award of benefits for permanent total disability is supported by substantial evidence, is a reasonable finding of fact and the award must therefore be affirmed. The Board erred by reversing the administrative law judge's award on grounds that he failed to give sufficient weight to expert medical testimony. The administrative law judge was not required to discuss expert testimony, as the record establishes that it failed to account for claimant's taking pain medication and it deferred on the issue of the effect of claimant's pain on his ability to work. *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78 (CRT) (5th Cir. 1991), *rev'g in part* 19 BRBS 15 (1986).

The administrative law judge is not bound by any particular standard or formula but may consider a variety of medical opinions and observations in addition to claimant's description of symptoms and physical effects of his injury in assessing the extent of claimant's disability under the schedule. *Pimpinella v. Universal Maritime Service Inc.*, 27 BRBS 154 (1993).

The Board rejects claimant's assertion that the administrative law judge erred in denying temporary total disability. Claimant had argued that the administrative law judge erred in relying on a doctor's opinion to deny temporary total disability compensation after having rejected the same doctor's opinion in finding causation established. The Board noted that administrative law judge did not explicitly reject the doctor's opinion regarding causation but found that, even if he had, this would not have constituted error as causation and disability are separate issues, and the administrative law judge may accept or reject all or any part of any witness' testimony according to his judgment. *Pimpinella v. Universal Maritime Service Inc.,* 27 BRBS 154 (1993).

The Fifth Circuit holds that the Board properly reversed the administrative law judge's finding of causation and remanded the case because the administrative law judge failed to note significant problems with the testimony of the doctor on whom he relied, and thus his reliance on it was patently unreasonable. *Lennon v. Waterfront Transport*, 20 F.3d 658, 28 BRBS 22 (CRT) (5th Cir. 1994).

The D.C. Circuit reversed the Board's decision that employer is entitled to Section 8(f) relief, holding that the Board exceeded it statutory scope of review in second-guessing the findings and credibility determinations of the administrative law judge in a case in which the findings have a basis in the record. *Director, OWCP v. Jaffe New York Decorating*, 25 F.3d 1080, 28 BRBS 30 (CRT) (D.C. Cir. 1994).

The D.C. Circuit reversed the Board's decision, finding that the Board exceeded its statutory authority when it recharacterized a physician's testimony, rather than determining whether the analysis of the physician's testimony by the administrative law judge was supported by substantial evidence. The court found that the evidence was sufficient to support the administrative law judge's finding of fact and noted that the Board must accept the administrative law judge's findings of fact, even where it believes that the administrative law judge's finding is not the more reasonable of two opposite inferences, as long as it is supported by substantial evidence. *Burns v. Director, OWCP*, 41 F.3d 1555, 29 BRBS 28 (CRT) (D.C. Cir. 1994).

21-13oo

The court affirmed the Board's holding that as the administrative law judge failed to discuss his reasoning for finding no aggravation, the appropriate course of action was to remand for clarification of the issue. *Bath Iron Works Corp. v. Director, OWCP [Jones]*, 193 F.3d 27, 34 BRBS 1(CRT)(1st Cir. 1999).

The Second Circuit notes the administrative law judge's discretion in evaluating the evidence of record but states that the expert opinion of a treating physician as to the existence of disability is binding unless contradicted by substantial evidence to the contrary. In this case, the administrative law judge erred in refusing to credit the opinion of claimant's treating psychiatrist because the opinion was based on claimant's subjective complaints, which the administrative law judge found were not credible. The court noted that the opinions of all of claimant's physicians were unanimous, and the administrative law judge therefore erred in substituting his judgment for that of the uncontradicted medical evidence. The court held that given that claimant was being treated with a powerful anti-depressant the administrative law judge erred in dismissing claimant's symptoms as merely subjective. Quoting *Wilder v. Chater*, 64 F.3d 335 (7th Cir. 1995), the court stated that "severe depression is not the blues. It is a mental health illness; and health professionals, in particular psychiatrists, not lawyers or judges are the experts on it." Accordingly, the court reversed the administrative law judge's denial of medical benefits for claimant's psychiatric condition which the doctors found was work-related. *Pietrunti v. Director OWCP*, 119 F.3d 1035, 31 BRBS 84(CRT) (2d Cir. 1997).

The Board rejected the parties' contentions requesting that it reject the attachments to each party's brief. In this case, both parties submitted Louisiana state court documents with their appellate briefs to demonstrate the sequence of events which took place in the Louisiana court system. These documents were not a part of the record before the administrative law judge. Nevertheless, the Board held that, as all the attachments are relevant official court documents which are consistent with each other and with which no party has a dispute, they are properly the subject of judicial notice. Therefore, the Board took judicial notice of the court documents and denied the parties' motions to strike. *Hill v. Avondale Industries, Inc.*, 32 BRBS 186 (1998), *aff'd sub nom. Hill v. Director, OWCP,* 195 F.3d 790, 33 BRBS 184(CRT) (5th Cir. 1999), *cert. denied*, 120 S.Ct. 2215 (2000).

The Board rejected claimant's assertion that it was improper for the administrative law judge to base his decision on circumstantial evidence. Provided the evidence is reasonably probative, it is admissible and the administrative law judge may rely on it in making his decision. Further, the Board may affirm a decision based on circumstantial evidence if that evidence meets the definition of substantial evidence. In this case, the administrative law judge's determinations of witness credibility were reasonable, and it was rational for him to rely on the testimony of those credible witnesses; thus, substantial evidence supports his conclusion that claimant's purpose for venturing into the depths of the darkened vessel was to smoke a marijuana cigarette in private. *Compton v. Avondale Industries, Inc.*, 33 BRBS 174 (1999).

21-13ooo

The Board rejected the assertion that, because it initially remanded the case to the administrative law judge to decide the responsible carrier issue, it may not now hold that neither carrier is liable. Although the underlying facts did not change, acceptance of such a position would divest the Board of its statutory review authority. Accordingly, the Board distinguished between this case and *Temporary Employment Services, Inc. v. Trinity Marine Group, Inc.*, 261 F.3d 456, 35 BRBS 92(CRT) (5th Cir. 2001) (issue involved indemnification agreements among employers and carriers) and reaffirmed its determination that the administrative law judge erred in resolving this traditional responsible carrier issue. Thus, the Board reaffirmed its conclusion that neither carrier is liable for benefits under the Act. However, the Board clarified that its initial decision does not affect, Chubb's liability under Pennsylvania law pursuant to its policy with employer. *Weber v. S.C. Loveland Co.*, 35 BRBS 190 (2002), *aff'g and modifying on recon.* 35 BRBS 75 (2001).

In this case, the administrative law judge declared employer in default for failing to attend the hearing, and he awarded claimant permanent total disability benefits on this basis. The Board vacated the administrative law judge's award because the decision was not supported by substantial evidence. Although claimant and the Director were in attendance at the hearing, the administrative law judge did not hear any testimony or admit any documentary evidence; thus, there was no evidence to support an award of permanent total disability benefits. Accordingly, the Board remanded the case for admission of evidence. Moreover, as employer established good cause for its failure to appear at the hearing, the Board held that employer must be allowed to participate in the proceedings on remand. *McCracken v. Spearin, Preston & Burrows, Inc.*, 36 BRBS 136 (2002).

The Board reviews the district director's implementation of a vocational rehabilitation plan under the "abuse of discretion" standard, which is a narrow standard and involves consideration of whether the decision was based on consideration of the relevant regulatory factors. *Meinert v. Fraser, Inc.*, 37 BRBS 164 (2003).

The Board strikes documents attached to employer's brief that attempt to establish that claimant has a wage-earning capacity without vocational retraining equal to that which he will have upon completion of the program. The documents were not submitted to the district director and therefore cannot be considered by the Board for the truth of the matter asserted. *Meinert v. Fraser, Inc.*, 37 BRBS 164 (2003).

Deference

Section 39 authorizes the Secretary of Labor to promulgate rules and regulations for the purposes of administering the Act. The courts have held that considerable deference is accorded to an agency's interpretation of its authorizing statutes, and thus, an agency need only adopt a permissible interpretation in order to be sustained. Rules or regulations of an agency empowered to adopt the particular rule must be sustained unless unreasonable and plainly inconsistent with the statute. Interpretative regulations should not be overruled except for weighty reasons. The party claiming that a regulation is invalid has the burden of so demonstrating. Where a regulation may be construed together with the statute so as to uphold the validity of the regulation while at the same time preserving the legislative intent and purpose behind the statute, the regulation must be upheld. In this case, the Board upholds the validity of the regulations at 20 C.F.R. §702.241-702.243 implementing amended Section 8(i). *McPherson v. National Steel & Shipbuilding Co.*, 26 BRBS 71 (1992), *aff'g on recon. en banc* 24 BRBS 224 (1991). *See also Norton v. National Steel & Shipbuilding Co.*, 27 BRBS 33 (1993), *aff'g on recon. en banc* 25 BRBS 79 (1991) (Brown, J., dissenting); *Cortner v. Chevron Int'l Oil Co., Inc.*, 22 BRBS 218 (1989).

The Board holds that Guam is covered by the Act, deferring to the Director's interpretation as to the scope of the Act's coverage in view of the ambiguity of the term "Territory" in Section 2(9). The Board holds, however, that deference is not due the Director on the issue of whether the University of Guam is a subdivision of the government of Guam, as resolution of this issue rests on the interpretation of case law and is not a matter of statutory interpretation. *Tyndzik v. University of Guam*, 27 BRBS 57 (1993) (Smith, J., dissenting in part), *rev'd in part sub nom. Tyndzik v. Director, OWCP*, 53 F.3d 1050, 29 BRBS 83 (CRT) (9th Cir. 1995).

The Board adopts the Director's position that the language of Section 7(d)(2) and the change in the regulation at 20 C.F.R. §702.422(b) gives the district director sole authority to consider whether to excuse the untimely first report of treatment. The regulation is not plainly erroneous or inconsistent with the statute, and the Director's interpretation must be sustained because it is reasonable and consistent with Section 7 as a whole. The Board, notes, however, that there are problems with the Director's interpretation. *Toyer v. Bethlehem Steel Corp.*, 28 BRBS 347 (1994) (McGranery, J., dissenting).

Although the Board interprets the 10-day period in Section 14(f) as meaning 10 calendar days, the Board states that it need not defer to the Director's agreement with this interpretation as the statutory language is unambiguous. *Irwin v. Navy Resale Exchange*, 29 BRBS 77 (1995).

21-13p

The Board rejected employer's contention that the definition of "length" under Section 701.301(a)(12)(iii)(F), the implementing regulation to Section 2(3)(F), should be interpreted the same as a Coast Guard regulation which defines the length of a vessel. The Board stated that, despite initial reliance on the Coast Guard regulation, the Director's reasonable interpretation of the regulation is that the Department's exclusion from its regulation of the exceptions listed in the Coast Guard regulation indicates a conscious effort to distinguish the two. The Board thus defers to the Director's interpretation of the regulation. *Powers v. Sea Ray Boats*, 31 BRBS 206 (1998).

21-13pp

Stay of Payments

The Fifth Circuit held that pursuant to 20 C.F.R. §802.105, an Order by the Board staying payments must contain specific findings based upon evidence submitted to it identifying the irreparable injury that will result to employer. That payment will be difficult or that payments made will be impossible to recoup if an award is reversed are insufficient to establish irreparable injury. Since employer did not even attempt to prove or allege irreparable injury, the Court vacated the Board's Order. Further, the Court reversed the Board's finding that Section 802.105 which requires that specific findings be made is invalid, holding that the regulation is consistent with 33 U.S.C. §921, legislative history, and jurisprudential development. Rivere v. Offshore Painting Contractors, 872 F.2d 1187, 22 BRBS 52 (CRT) (5th Cir. 1989).

The Ninth Circuit held that the Board erred in issuing a stay of payment order because there was no showing of an irreparable injury that would result to employer if forced to pay benefits. The Ninth Circuit rejected employer's contention that for a stay of payment to be issued, irreparable injury need not be shown where the appeal filed before the Board involves subject matter jurisdiction rather than the merits of the case. *Edwards v. Director, OWCP*, 932 F.2d 1325, 24 BRBS 146 (CRT) (9th Cir. 1991).

On reconsideration, the Board holds that LIGA's request for an expedited hearing on its motion to stay payments pending the Board's resolution of its motion for reconsideration is moot in view of the issuance of the Board's decision on reconsideration. Also, because LIGA failed to assert any specific error regarding the administrative law judge's findings regarding claimant's entitlement, the Board concluded that LIGA must continue to pay claimant temporary total disability as awarded by the administrative law judge pending resolution of the case on the merits on remand. *Abbott v. Universal Iron Works, Inc.*, 24 BRBS 169 (1991), *aff'g and modifying on recon.* 23 BRBS 196 (1990).

Where employer asserted fraud and a state-law counterclaim in response to claimant's enforcement action, the court determined that Congress intended the affirmative defenses be adjudicated by DOL in a Section 22 modification hearing, and not by the district court, so as to prevent the needless duplication of judicial/ administrative efforts and the possibility of inconsistent outcomes. The court noted that an appeal in either proceeding would wind up in the court of appeals. Further, it concluded that the Act divests the district court of the power to stay, under Section 21(b), the Section 21(d) enforcement pending the outcome of the modification hearing unless employer establishes "irreparable injury" (which will only be found in extraordinary circumstances and must be more than a showing of financial difficulty in making payments or that the payments would be unrecoverable). *Williams v. Jones*, 11 F.3d 247, 27 BRBS 142 (CRT)(1st Cir. 1993).

The Eighth Circuit affirmed the Board's denial of a motion for a stay of payments and held that an award of benefits may only be stayed pending review upon a showing of irreparable injury, *i.e.*, extreme financial hardship to employer or its insurer. The court further held that the traditional irreparable injury standard is constitutional even if the administrative law judge's award is challenged on due process grounds. *Meehan Seaway Service Co. v. Director, OWCP*, 4 F.3d 633, 27 BRBS 108 (CRT)(8th Cir. 1993).

In affirming the Board's denial of a stay of payments, the Seventh Circuit held that since employer's insurance carrier was making the compensation payments, the burden was upon employer to demonstrate that payment of benefits would cause the *carrier*, not employer, irreparable injury under Section 21(b)(3). Since there was no evidence that irreparable injury would ensue to employer's carrier, the court held that a stay of payments was not appropriate. *Maxon Marine, Inc. v. Director, OWCP*, 63 F.3d 605, 29 BRBS 109 (CRT)(7th Cir. 1995).

Remand by Board

Administrative law judge is bound by Board's mandate on remand and cannot reconsider questions on which the Board has ruled. *Stokes v. George Hyman Construction Co.,* 19 BRBS 110 (1986).

The Board vacated an administrative law judge's Decision and Order on Remand and remanded the case again, as the administrative law judge did not follow the Board's instructions in its initial Decision and Order. The administrative law judge erroneously concluded that the Board's decision resolved the maximum medical improvement and Section 8(f) issues, whereas the Board had merely remanded these issues for reconsideration due to legal errors of the administrative law judge. *Randolph v. Newport News Shipbuilding & Dry Dock Co.,* 22 BRBS 443 (1989).

In remanding the case, the Board directed that it be assigned to a different administrative law judge on remand where the administrative law judge acted unreasonably in dismissing claimant's claim without a hearing. *Bogdis v. Marine Terminals Corp.,* 23 BRBS 136 (1989).

Administrative law judge violated 20 C.F.R. §802.405(a) when he disregarded Board's remand order instructing him to consider whether employer established rebuttal of the Section 20(a) presumption and reconsidered claimant's entitlement to invocation of the Section 20(a) presumption. *Obert v. John T. Clark & Son of Maryland*, 23 BRBS 157 (1990).

The Board denies employer's motion for reconsideration alleging that the Board erred in remanding the case for consideration of a narrow status issue. That the original administrative law judge is deceased does not justify affirming a decision containing an error of law. It may not be necessary to hold a new hearing on remand, but if it is, the scope of remand is narrow and will not involve the use of extensive adjudicatory resources. *Garmon v. Aluminum Co. of America - Mobile Works*, 29 BRBS 15 (1995), *aff'g on recon.* 28 BRBS 46 (1994).

Law of the Case

Law of the case doctrine is merely a matter of judicial economy, and an intervening contrary decision offers a cogent reason for reexamining a previous holding. Stokes v. George Hyman Construction Co., 19 BRBS 110 (1986).

The Board declines to address issues of situs, *res judicata*, collateral estoppel and election of remedies. These issues were decided in the previous appeal and the Board's first decision has become law of the case. Dixon v. John J. McMullen & Associates, Inc., 19 BRBS 243 (1986).

In a case before the Board for the second time, the Board declined to consider an issue relating to a child's entitlement to benefits which it had fully considered and resolved in the first appeal, holding that its prior decision was the law of the case. Doe v. Jarka Corp. of New England, 21 BRBS 142 (1988).

The Board's prior holding that the trip-payment exception to the coming and going rule would apply if claimant was returning from work when the accident occurred constitutes the law of the case. The Board, therefore, rejected claimant's argument that even if he was not returning from work when the accident occurred, other factors establish that the accident occurred in the course of his employment. Oliver v. Murry's Steaks, 21 BRBS 348 (1988).

On appeal after remand for findings regarding Sections 3(b) and 20(d), the majority held that its prior decision in Williams v. Healy-Ball-Greenfield, 15 BRBS 489 (1983), that claimants' injuries arose out of their employment was the law of the case and declined to reconsider the issue. In response to the dissent, the Board rejected the argument that this issue should be reopened, holding that while it had the power to reconsider its first decision, none of the generally accepted reasons for doing so was present. The majority found that there was no change in the underlying fact situation, no intervening

controlling authority demonstrating that the initial decision was erroneous, and the Board's initial decision was neither clearly erroneous nor resulted in a manifest injustice. Williams v. Healy-Ball-Greenfield, 22 BRBS 234 (1989)(Brown, J., dissenting).

In a case before the Board for the second time, the Board holds that the issue of D.C. Act jurisdiction had been fully considered in the Board's prior opinion; accordingly that decision constitutes the law of the case. The Board, therefore, declines to address employer's contentions regarding the issue of jurisdiction. Brocklehurst v. Giant Food, Inc., 22 BRBS 256 (1989).

The Board vacates the administrative law judge's award of permanent total disability, as the Board's prior decision that the claimant id only for permanent partial disability is the law of the case. *Januszieicz v. Sun Shipbuilding & Dry Dock Co.*, 22 BRBS 376 (1989).

In an appeal of an attorney's fee levied against claimant, the Board rejects claimant's argument that it reconsider its prior holding in Armor, 19 BRBS 119 (1986) (en banc), regarding the interpretation of Section 28(b) of the Act. The Board's prior holding constitutes the law of the case. Armor v. Maryland Shipbuilding & Dry Dock Co., 22 BRBS 316 (1989).

Where the Board had fully considered and resolved the situs issue in its prior decision, the Board declines to consider that issue again, since its prior decision constitutes the law of the case. *Bruce v. Bath Iron Works Corp.*, 25 BRBS 157 (1991).

The Board declined to reconsider its holding from the first appeal in this case that claimant is entitled to permanent total disability benefits based on the law of the case doctrine. *Wayland v. Moore Dry Dock*, 25 BRBS 53 (1991).

As employer's arguments as to representation by counsel were previously considered and rejected by the Board in its initial Decision and Order and as employer failed to make any persuasive argument as to why this determination was in error, the Board affirmed its determination in its initial decision that employer's representation by a claims examiner was not representation by counsel within the meaning of Section 702.241(h) of the regulations. *McPherson v. National Steel & Shipbuilding Co.*, 26 BRBS 71 (1992), *aff'g on recon. en banc* 24 BRBS 224 (1991).

The Board held that the law of the case doctrine did not preclude its consideration of claimant's argument on appeal that the administrative law judge erred in ordering that interest be determined after application of employer's Section 33(f) credit in one lump sum as opposed to the dates on which the settlement proceeds were actually received. The question of interest was not at issue at the time of the first appeal before the Board as no additional benefits were found to be due, and it was not until after the administrative law judge's second decision, when the administrative law judge entered an award pursuant to Section 8(c)(23) and awarded employer additional credits, that interest became an issue. At any rate, as interest is mandatory, it may be raised at any time. *Jones v. U.S. Steel Corp.*, 25 BRBS 355 (1992).

The "law of the case" doctrine, while departed from only for compelling reasons, is not an absolute bar when the same tribunal is reviewing its own interlocutory order. Thus, the administrative law judge could decide Section 8(f)(3) issues at the second hearing in this case, despite his earlier intimation that Section 8(f)(3) and his remand of the case to the deputy commissioner for the merits of Section 8(f). *Ortiz v. Todd Shipyards Corp.*, 25 BRBS 228 (1991).

The Board rejects employer's contention that the Director is barred from raising the issue of Section 8(f) contribution because she did not raise at any of the earlier proceedings. There is no procedural rule barring consideration of the issues raised due to the change in law after the administrative law judges' and Board's decisions were issued. *Stone v. Newport News Shipbuilding & Dry Dock Co.*, 29 BRBS 44 (1995).

The Board, without addressing any of the specific arguments, rejected a borrowing employer's contention that the Board has no jurisdiction over this case because it is a contract dispute between an employer and an insurer. The Board held that this issue was fully addressed and decided in its previous decision, *Schaubert*, 31 BRBS 24, and that the prior decision is the law of the case. *Schaubert v. Omega Services Industries*, 32 BRBS 233 (1998).

The issue of whether the administrative law judge erred in allowing claimant to submit evidence post-hearing concerning his unsuccessful job search was fully considered and resolved by the Board in the prior appeal of this case by employer; therefore, the Board's decision on this issue constitutes the law of the case and the Board declined to consider this issue again. *Ion v. Duluth, Missabe & Iron Range Ry. Co.,* 32 BRBS 268 (1998).

The Board declines to address employer's contention that the Ninth Circuit's decision in *Hunt v. Director, OWCP*, 999 F.2d 419, 27 BRBS 84 (CRT) (9th Cir. 1993), was incorrectly decided inasmuch as the Board addressed this contention in its prior decision, which is the law of the case. *Buchanan v. Int'l Transportation Services*, 33 BRBS 32 (1999), *aff'd mem.,* No. 99-70631 (9th Cir. Feb. 26, 2001).

In a Section 33(g) case, the Board disagreed with the Director's view that the Board need not consider the merits of the employer's appeal of the administrative law judge's decision based on the law of the case doctrine. In its previous decision, 30 BRBS 25 (1996), the Board, relying on *Harris,* 28 BRBS 254 (1994) and 30 BRBS 5 (1996), held that the administrative law judge erred in granting summary judgment without a determination as to whether the claimants, who alleged occupational injuries, were persons "entitled to compensation." In view of the employer's contention that the subsequent holding by the Supreme Court in *Rambo II*, 521 U.S. 121, 31 BRBS

54(CRT)(1997), supported its position that claimant was a person entitled to compensation, the Board ruled that it would not apply the discretionary law of the case doctrine. *Gladney v. Ingalls Shipbuilding, Inc.*, 33 BRBS 103 (1999).

21-13u

In this "borrowed employee" case, the Board rejected the contention of TESI, the lending employer, that Trinity, the borrowing employer, improperly relied on the indemnity clause contained in the TESI/Trinity contract. As the Board addressed and rejected this contention in its previous decision, the prior decision constitutes the law of the case. *Ricks v. Temporary Employment Services, Inc.*, 33 BRBS 81 (1999), *rev'd sub nom. Temporary Employment Services v. Trinity Marine Group, Inc.,* 261 F.3d 456, 35 BRBS 92(CRT) (5th Cir. 2001).

The Board declined to reconsider its previous holding that employer is entitled to a credit for settlement monies paid to claimant by other longshore employers for the same disability based on the law of the case doctrine. *Alexander v. Triple A Machine Shop,* 34 BRBS 34 (2000), *rev'd sub nom. Alexander v. Director, OWCP,* 297 F.3d 805, 36 BRBS 25(CRT) (9th Cir. 2002).

The Board reaffirmed its prior decision, applying the law of the case doctrine, that claimant, who was injured in the port of Kingston, Jamaica, was injured on a covered situs. The Board examined the exceptions to the doctrine and found none applicable, including that involving intervening case law; therefore, it held, in light of developing case law, that "navigable waters" includes injuries on the high seas and in foreign territorial waters when all contacts except the site of injury are with the United States. *Weber v. S.C. Loveland Co.*, 35 BRBS 75 (2001), *aff'd on recon.,* 35 BRBS 190 (2002).

The Board denies claimant's motion for reconsideration of its decision. On reconsideration, claimant raises issues that are not properly before the Board. One issue challenges the administrative law judge's decision on remand and was initially raised in claimant's response brief to the Director's appeal, and not in a cross-appeal. The other two issues were not raised in an appeal after the administrative law judge's decision on remand; the issues cannot be raised for the first time in motion for reconsideration. In any event, the issues relate to the administrative law judge's initial decision, and the Board's first decision in this case thus constitutes the law of the case. *Ravalli v. Pasha Maritime Services,* 36 BRBS 91 (2002), *denying recon. in* 36 BRBS 47 (2002).

The Board affirms the holding from its initial decision, that claimant's job is essential to the shipbuilding process, based on the law of the case doctrine. *Boone v. Newport News Shipbuilding & Dry Dock Co*., 37 BRBS 1 (2003).

<u>Retroactivity - Case Law</u>

On reconsideration, the Board rejects employer's contention that it erred in relying on Louisiana cases decided more than one year after the hearing which were not a part of the record before the administrative law judge. Because the Louisiana cases merely reaffirm *Wilkerson v. Jimco, Inc.*, 499 So. 2d 1245 (La. App. 4th Cir. 1986), which had been issued prior to the administrative law judge's Decision, the Board's reliance on these cases did not result in manifest injustice. *Abbott v. Universal Iron Works*, 24 BRBS 169 (1991), *aff'g and modifying on recon.* 23 BRBS 196 (1990).

Retroactivity - Statutes

Contrary to LIGA's contention, where amendment to definition of insurance policy under Louisiana law does not contain any express provision that it be applied retroactively, and the legislation is substantive, not procedural, the amendment is to be applied prospectively only. *Abbott v. Louisiana Ins. Guaranty Ass'n*, 27 BRBS 192 (1993), *aff'd*, 40 F.3d 122, 29 BRBS 22 (CRT) (5th Cir. 1994).

The Board held that under the cases of *Harper v. Virginia Dep't of Taxation*, 509 U.S. 86 (1993) and *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529 (1991), the *Cowart* decision must be given retroactive effect to the parties in the instant case inasmuch as the Court in *Cowart* applied the ruling to the parties before it. Inasmuch as the claimant failed to obtain employer's prior written approval of her third-party settlements, her claim for death benefits is barred under Section 33(g). *Kaye v. California Stevedore & Ballast*, 28 BRBS 240 (1994).

Miscellaneous

The Board follows a Fifth Circuit case, *Ward*, 684 F.2d 1114, 15 BRBS 7 (CRT) (5th Cir. 1982), *cert. denied*, 459 U.S. 1170 (1983), in case arising in the Fourth Circuit. The Board reasons that it is the only appellate case on point, and that the law of another circuit is instructive in the absence of definitive precedent. *Barnard v. Zapata Haynie Corp.*, 23 BRBS 267 (1990), *aff'd*, 933 F.2d 256, 24 BRBS 160 (CRT) (4th Cir. 1991).

The Board follows a Fourth Circuit case, *Lentz*, 852 F.2d 129, 21 BRBS 109 (CRT) (4th Cir. 1988), in a case arising the Fifth Circuit, inasmuch as the Fourth Circuit's law on suitable alternate employment was developed based on Fifth Circuit law. *Green v. Suderman Stevedores*, 23 BRBS 389 (1990), *rev'd sub nom. P & M Crane Co. v. Hayes*, 930 F.2d 424, 24 BRBS 116 (CRT), *reh'g denied,* 935 F.2d 1293 (5th Cir. 1991).

The Board states that it regards its unpublished Decisions and Orders as lacking precedential value. Therefore, unpublished Board decisions generally should not be cited or relied upon by parties in presenting their cases. *Lopez v. Southern Stevedores*, 23 BRBS 295 (1990).

The Fifth Circuit held that a potential three-year delay in the Board's review of the case does not violate the aggrieved party's due process rights absent an explanation as to why the delay is unreasonable. *Abbott v. Louisiana Ins. Guaranty Ass'n*, 889 F.2d 626, 23 BRBS 3 (CRT) (5th Cir. 1989).

Review by United States Courts of Appeals

Proper Circuit for Appeal

Appeal from D.C. Act case must be made to circuit in which injury occurred, which in this case would be the Fourth Circuit. However, in view of the holding of the D.C. Circuit in National Van Lines that it has jurisdiction over all D. C. Act cases, the Board followed precedent established by that court. Norfleet v. Holladay-Tyler Printing Corp., 20 BRBS 87 (1987).

The Fourth Circuit states that it has jurisdiction over claims arising under the 1928 D.C. Act if the injury occurs within the circuit, consistent with Section 21(c). *Exhibit Aids, Inc. v. Kline*, 820 F.2d 650, 20 BRBS 1 (CRT) (4th Cir. 1987).

The D.C. Circuit states that it is bound by its precedent in *National Van Lines* that it has jurisdiction over injuries giving rise to claims under the D.C. Act, even if the injury occurs outside the District of Columbia. The court states that this is especially true given the "disappearance of the statutory regime to which the *National Van Lines* holding applies." *Greenfield v. Volpe Construction Co., Inc.*, 849 F.2d 635, 21 BRBS 118 (CRT) (D.C. Cir. 1988), *rev'g* 20 BRBS 46 (1987).

Process of Appeal

Where petition for review was submitted to the Court of Appeals more than 60 days after the Board's decision was issued, and where the 60-day appeal period provided by Section 21(c) of the Longshore Act had not been tolled by the petitioner's submission of an untimely motion for reconsideration to the Board, the court dismissed the petitioner's appeal as untimely. Bolling v. Director, OWCP, 823 F.2d 165 (6th Cir. 1987).

The Sixth Circuit dismissed an appeal where the appeal was received by the court several months after the issuance of the Board's decision, noting that it cannot accept the date a letter is received by the Board as the date of filing in the court. *Fairchild v. Director, OWCP*, 863 F.2d 16, 22 BRBS 41 (CRT) (6th Cir. 1988).

Under Section 21(c), a petition for review must be filed within 60 days following issuance of the Board's order. The petition must be actually received by the clerk on or before the 60th day to be timely. The Third Circuit accepted a pro se appeal where claimant filed a notice of appeal with the Board 50 days after the Board's Decision and Order was issued, as claimant attempted to file an appeal within the 60-day limit, albeit with the wrong "court." Shendock v. Director, OWCP, 861 F.2d 408, 12 BLR 2-48 (3d Cir. 1988) (black lung case).

The Fourth Circuit held that an appeal of the Board's decision which was timely filed with the Board within 60 days after its decision was issued, was not timely filed with the Office of the Clerk of the Court of Appeals, and therefore the court did not have jurisdiction to review the appeal. The court stated that claimant made no showing that the 15 day delay by the Board in advising him of his mistake was an unreasonable delay. The court also refuses to apply FRCP 4(a) to an appeal from a Board decision. *Adkins v. Director, OWCP*, 889 F.2d 1360, 13 BLR 2-142 (4th Cir. 1989) (black lung case).

The Ninth Circuit dismissed claimant's appeal as it was received by the court on the 67th day after the Board's decision was issued. The fact that the appeal was mailed on the 60th day is insufficient, as the petition must actually be received by the court before the expiration of the 60th day. *Felt v. Director, OWCP*, 11 F.3d 951, 27 BRBS 165 (CRT) (9th Cir. 1993).

Employer filed its appeal with the court of appeals more than 60 days after the Board made its determination but less than 60 days after employer learned of the decision. In rejecting employer's argument that *Nealon* is controlling and that the word issuance under Section 21(c) and its regulations has the same meaning as filed under Section 21(a) and Section 19(e), the Ninth Circuit noted that every circuit faced with the question of the word issuance in Section 21(c) determined that it means filing with the Board's clerk and nothing more. The court dismissed employer's appeal as untimely. *Stevedoring Services of America v. Director, OWCP*, 29 F.3d 513, 28 BRBS 65 (CRT)(9th Cir. 1994).

The Ninth Circuit held that claimant timely filed his appeal with that court within 60 days of the Board’s decision affirming the administrative law judge’s denial of benefits. That claimant filed an untimely motion for reconsideration which the Board subsequently acted upon by denying, instead of dismissing, did not toll the 60 day period to file his appeal. The court distinguished the Tenth Circuit’s holding in *Bridger Coal Co./Pacific Minerals, Inc. v. Director, OWCP*, 927 F.2d 1150, 1152 (10th Cir. 1991), that a motion for reconsideration renders the underlying Board decision nonfinal and thus precludes judicial review of that action, as the Tenth Circuit in *Bridger* was addressing a timely motion for reconsideration. *Duhagon v. Metropolitan Stevedore Co.*, 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999).

In this case, in its appeal filed with the Fourth Circuit, employer requested review only of an order which summarily denied reconsideration, and the Fourth Circuit held that it does not have jurisdiction when an appeal requests review of an unreviewable order. In a second appeal filed in the same case, the court held that it did have jurisdiction to review an order in which the Board granted reconsideration but denied the relief requested, as such an order establishes that the Board re-opened the proceedings, reconsidered the issues, and issued a new final order setting forth the resolution -- even if the result is a reaffirmation of the previous decision. Thus, an appeal filed within 60 days of such an order is timely and the order is reviewable on the merits. “Appealable reaffirmations” and “unappealable denials” are distinguished by “the agency’s formal disposition” and not by any amount of discussion which may be noted therein. The Fourth Circuit noted that the Sixth and Seventh Circuits have held that appeals to those courts must occur within 60 days after the Board’s decision on a motion for reconsideration, as second or successive motions do not further toll the period for filing a petition for review, but it stated that, in this case, it need not decide whether to follow that precedent, as the jurisdictional defect mentioned above dispositively resolved the issue. *Betty B Coal Co. v. Director, OWCP*, 194 F.3d 491 (4th Cir. 1999).

Jurisdiction

The D.C. Circuit held that the 1928 D.C. Workmen's Compensation Act is a matter of local law, and therefore it will defer to the D.C. Court of Appeals' construction of the D.C. Act as it applies the terms of the Longshore Act. The Circuit Court therefore affirmed the D.C. Court of Appeals' holding that an employee's tort claim was barred by the exclusivity provisions of the Longshore Act, as applied by the 1928 D.C. Act. Hall v. C & P Telephone Co., 809 F.2d 924, 19 BRBS 67 (CRT)(D.C. Cir. 1987).

The Ninth Circuit ruled that the district court lacked subject matter jurisdiction, under the Longshore itself or under an implied cause of action under the Act, of a complaint brought by employer to recover an alleged overpayment of compensation benefits paid to claimant. *Stevedoring Services of America, Inc. v. Eggert*, 953 F.2d 552, 25 BRBS 92 (CRT) (9th Cir. 1992), *cert. denied*, 505 U.S. 1230 (1992).

The Longshore Act creates no express or implied remedy, enforceable in the district court, for an employer to recover an overpayment of compensation. Moreover, because Congress provided an exclusive scheme of review under the Longshore Act, there is no jurisdiction, under the general federal question statute, to consider employer's assertion of a federal common law right to recovery of an overpayment. *Ceres Gulf v. Cooper*, 957 F.2d 1199, 25 BRBS 125 (CRT) (5th Cir. 1992).

The Fifth Circuit holds that Section 21(b) of the Longshore Act as amended in 1972, which provides for review first by the Board and then by the United States Court of Appeals for the circuit in which the injury occurred, is not fully applicable to claims arising under the Defense Base Act, pursuant to 42 U.S.C. §1653(b). Instead, although the initial appeal of a compensation order issued on a Defense Base Act claim is to the Benefits Review Board, review of the BRB decision is to be undertaken by a district court, rather than by a U.S. Court of Appeals. The district court decision is then appealable to the Court of Appeals. *AFIA/CIGNA Worldwide v. Felkner*, 930 F.2d 1111, 24 BRBS 154 (CRT)(5th Cir. 1991), *cert. denied*, 502 U.S. 906 (1991).

The Fourth Circuit, in agreement with the Fifth and Sixth Circuits, and in disagreement with the Ninth Circuit, holds that the court of appeals does not have jurisdiction to hear the initial judicial review of Board decisions in Defense Base Act cases. Rather, after jurisdiction for judicial review of a Board decision in Defense Base Act cases lies in the appropriate district court. *Lee v. Boeing Co., Inc.*, 123 F.3d 801, 31 BRBS 101(CRT) (4th Cir. 1997).

In a case where claimant was awarded benefits but employer did not pay the award, claimant filed an enforcement action with the district court pursuant to Section 21(d). The district court issued an enforcement order, rejecting employer's arguments in defense and request for a stay. The First Circuit determined that, as Section 21(d), (e) does not specify the procedure for notifying an employer of an enforcement action, FRCP 4 applies. Therefore, as service of process of Section 21(d) actions must be in accordance with FRCP 4 & 31(a)(6), the district court herein did not obtain *in personam*

jurisdiction over employer, and the court vacated the enforcement order. *Williams v. Jones*, 11 F.3d 247, 27 BRBS 142 (CRT) (1st Cir. 1993).

Pursuant to Section 21(d), issues regarding enforcement of an attorney fee award must be addressed to the district court, and not to the circuit court. *Jensen v. Weeks Marine, Inc.*, 346 F.3d 273, 37 BRBS 99(CRT) (2d Cir. 2003).

Where employer asserted fraud and a state law counterclaim in response to claimant's enforcement action, the First Circuit determined that Congress intended that affirmative defenses be adjudicated by DOL in a Section 22 modification hearing, and not by the district court, so as to prevent the needless duplication of judicial/administrative efforts and the possibility of inconsistent outcomes. Further, it concluded that the Act divests the district court of the power to stay the Section 21(d) enforcement pending the outcome of the modification hearing unless employer establishes "irreparable injury" (which will only be found in extraordinary circumstances and must be more than a showing of financial difficulty in making payments or that the payments would be unrecoverable). *Williams v. Jones*, 11 F.3d 247, 27 BRBS 142 (CRT) (1st Cir. 1993).

The Fifth Circuit affirmed the district court's dismissal of employer/carrier's claim for reimbursement to recover overpayments from a medical care provider under Section 21(d), for lack of subject matter jurisdiction. The court noted that Section 21(d) expressly provides that a cause of action for reimbursement can be brought only if the beneficiary of a compensation order is seeking to enforce that order against the employer or its agents. Thus, the court rejected employer's attempt to infer an implied, reciprocal right of reimbursement from claimant in Section 21(d). The court found that as Congress had intended that an employer not be allowed to bring a cause of action to recover overpayments from a medical provider, implying such a cause of action would be not only a impermissible and unjustified expansion of federal jurisdiction but would also frustrate rather than advance the efficient use of judicial resources. *Petroleum Helicopters, Inc. v. Nancy Garrett, L.P.T.*, 23 F.3d 107, 28 BRBS 40 (CRT) (5th Cir. 1994).

The Seventh Circuit affirms the district court's determination that it lacks jurisdiction over employer's claim for declaratory relief against DOL challenging the district director's "revocation" of the Section 3(d) small vessel exemption during his processing of claimant's claim, as employer failed to exhaust its administrative remedies through the department. *Maxon Marine, Inc. v. Director, OWCP,* 39 F.3d 144, 28 BRBS 113 (CRT) (7th Cir. 1994).

The Ninth Circuit held that Public Law 104-134, which limits the time an appeal may remain pending before the Board to one year, does not violate the constitutional separation of powers principles. The court stated that the Board is a “constitutionally

permissible adjunct tribunal" over which Congress has broad authority. Consequently, the court had jurisdiction to review the two cases before it. Moreover, the court held that Public Law 104-134 does not preclude a motion for reconsideration to the Board of a case which was administratively affirmed because it remained pending for over one year; therefore, a motion for reconsideration tolls the sixty-day period during which a party may appeal a case to the Circuit Court. Consequently, the court held that the appeals in these two cases were timely. *Ramey v. Stevedoring Services of America*, 134 F.3d 954, 31 BRBS 206(CRT) (9th Cir. 1998).

The First Circuit holds that a case or controversy exists under Article III of the United States Constitution where claimant had been fully compensated for temporary disability and medical expenses by employer under the state workers' compensation statute and sought a declaratory ruling that his injury was covered by the Longshore Act. The court held that an administrative law judge may grant declaratory relief resolving the issue of disputed coverage if claimant shows a significant possibility of future disability or medical expenses related to the injury. *Neely v. Benefits Review Board,* 139 F.3d 276, 32 BRBS 73(CRT) (1st Cir. 1998).

After reviewing the administrative review scheme of longshore cases and legislative history of the Act, the Third Circuit held that if this scheme is inadequate to address a "wholly collateral claim," district court jurisdiction is not precluded over that claim. In this case, Kreschollek challenged the constitutionality of Section 14 of the Act - specifically, whether he was deprived of his due process rights due to lack of a hearing before voluntary benefits were terminated. Acknowledging that the legislative history and administrative scheme preclude district court jurisdiction over ordinary challenges, the court concluded that because Kreschollek had alleged a sufficiently serious irreparable injury --lack of a pretermination hearing-- such is a matter of constitutional right that the administrative process is inadequate to afford him full relief; therefore, district court jurisdiction is not precluded in this instance. Further, the court held that the district court's exercise of jurisdiction over this collateral claim would have no bearing on the merits of Kreschollek's claim of entitlement to benefits. *Kreschollek v. Southern Stevedoring Co.*, 78 F.3d 868, 30 BRBS 21 (CRT) (3d Cir. 1996); *but see American Manufacturers Mutual Ins. Co. v. Sullivan,* 526 U.S. 40, 33 BRBS 4(CRT) (1999)(Supreme Court holds that Pennsylvania law allowing insurers to withhold medical payments before a hearing does not violate 14th Amendment due process clause-no state action involved and no entitlement to all medicals established, only reasonable and necessary medicals).

<u>Standard of Review</u>

The D.C. Circuit notes that where a challenge to an administrative law judge's action is not clearly presented to the Board, it is doubtful that the issue is preserved for Court of Appeals' review. Stark v. Washington Star Co., 833 F.2d 1025, 20 BRBS 40 (CRT) (D.C. Cir. 1987).

The Seventh Circuit vacated and remanded the Board's decision, holding that the administrative law judge's mistaken belief that claimant returned to work as soon as he was reinstated by employer was not "harmless" error. The court stated that an administrative law judge's mistake can be deemed harmless only if his ultimate ruling did not depend on his erroneous factual finding. In the instant case, the administrative law judge's conclusion that claimant failed to show that he was unable to perform the duties of his job was based, at least in part, on his erroneous belief that claimant returned to work as soon as employer permitted. Moore v. Director, OWCP, 835 F.2d 1219, 20 BRBS 68 (CRT) (7th Cir. 1987).

The circuit court can affirm an order of the Board on a different ground or principle than that relied upon by the Board. *J.M. Martinac Shipbuilding v. Director, OWCP*, 900 F.2d 180, 23 BRBS 127 (CRT)(9th Cir. 1990).

In reviewing the Board's decision on appeal, the court must determine whether the Board adhered to the proper scope of review, committed any error of law, and whether the administrative law judge's findings are supported by substantial evidence. To determine whether the Board exceeded its scope of review, the court conducts an independent review of the record to see if the administrative law judge's findings are supported by substantial evidence. *Burns v. Director, OWCP*, 41 F.3d 1555, 29 BRBS 28 (CRT) (D.C. Cir. 1994); *Whitmore v. AFIA Worldwide Insurance*, 837 F.2d 513, 20 BRBS 84 (CRT)(D.C. Cir. 1988).

Unpublished decisions issued before January 1, 1996, by the United States Court of Appeals of the Fifth Circuit are precedential to subsequent cases arising within that circuit. *Weaver v. Ingalls Shipbuilding, Inc.*, 282 F.3d 357, 36 BRBS 12(CRT) (5th Cir. 2002).

21-20b

The court is not free to re-weigh the evidence or to make determinations of credibility. The scope of review is limited to whether the Board made any errors of law and whether the administrative law judge's findings of fact are supported by substantial evidence. *Sealand Terminals, Inc. v. Gasparic*, 7 F.3d 321, 28 BRBS 7 (CRT)(2d Cir. 1993); *ITO Corp. v. Director, OWCP*, 883 F.2d 422, 22 BRBS 126 (CRT) (5th Cir. 1989); *Goldsmith v. Director, OWCP*, 838 F.2d 1079, 21 BRBS 27 (CRT) (9th Cir. 1988).

The Ninth Circuit reviews the Board's decisions for errors of law and adherence to the substantial evidence standard, and the court may affirm the decision on any basis contained in the record. *Cretan v. Bethlehem Steel Corp.*, 1 F.3d 843, 27 BRBS 93 (CRT) (9th Cir. 1993), *cert. denied*, U.S. , 114 S.Ct. 2705 (1994).

The Fourth Circuit states that it reviews the Board's decisions for errors of law and to determine whether it properly adhered to the statutorily-mandated "substantial evidence" standard in reviewing the administrative law judge's decision. The findings of the administrative law judge may not be disregarded on the basis that other inferences are more reasonable. *Pittman Mechanical Contractors, Inc. v. Director, OWCP*, 35 F.3d 122, 28 BRBS 89 (CRT) (4th Cir. 1994). *See also See v. Washington Metropolitan Area Transit Authority*, 36 F.3d 375, 28 BRBS 96 (CRT) (4th Cir. 1994).

The Ninth Circuit will not address an issue not raised below unless necessary to prevent manifest injustice or if unusual circumstances warrant such review. In this case, exceptional circumstances were found to warrant review of the Board's decision affirming the denial of post-judgment interest on a fee award, based on the Board's subsequent decision in *Bellmer*, 32 BRBS 245 (1998), permitting a supplemental fee award to account for delay in payment of the fee. *Johnson v. Director, OWCP*, 183 F.3d 1169, 33 BRBS 55(CRT)(9th Cir. 1999).

<u>Deference</u>

The Supreme Court states that it need not decide what deference is due the Director's "new" interpretation of Section 33(g) which he formed in the course of the litigation, as it holds that the plain language of Section 33(g) is clear. *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 496, 112 S.Ct. 2589, 26 BRBS 49 (CRT) (1992).

The First Circuit states that no deference is due the Director's interpretation of the case law of the circuit. *Liberty Mutual Ins. Co. v. Commercial Union Ins. Co.*, 978 F.2d 750, 26 BRBS 85 (CRT) (1st Cir. 1992).

The First Circuit declines to decide what deference is due the Director's interpretation of the Act, because the case before it concerns the Director's interpretation of the judicially-created manifest component of Section 8(f), and not his interpretation of the Act or its regulations. Moreover, the Director is a litigant in a Section 8(f) case. *Director, OWCP v. General Dynamics Corp. [Lockhart]*, 980 F.2d 74, 26 BRBS 116 (CRT) (1st Cir. 1992).

In appeals to the Second Circuit, the interpretations of the Director of the Act are not entitled to special deference when the Director has an adversarial position in the litigation. *Director, OWCP v. General Dynamics Corp. [Krotsis]*, 900 F.2d 506, 23 BRBS 40 (CRT) (2d Cir. 1990).

The Second Circuit holds that since Congress delegated to the Secretary of Labor the power to prescribe rules and regulations under the Act, the Director's reasonable interpretations of the Act are to be accorded deference. Thus, the court revised the approach to deference as expressed in *Director, OWCP v. General Dynamics Corp. [Krotsis]*, 900 F.2d 506, 23 BRBS 40 (CRT) (2d Cir. 1990), wherein it declined to give special deference to the Director's interpretation of the Act when he appeared in an adversarial capacity. It noted that the fact that a position is newly announced by the Director in litigation does not mean the position does not warrant deference, but that this may be considered in determining the reasonableness of the Director's position. The court also noted that the deference it will accord the Director does not extend beyond his reasonable interpretation of a statute's meaning and does not apply to every instance of a statute's application to particular facts, as this would go too far in usurping the role allocated the Benefits Review Board. *Director, OWCP v. General Dynamics Corp. [Bergeron]*, 982 F.2d 790, 26 BRBS 139 (CRT) (2d Cir. 1992).

The Third Circuit states that it owes no deference to the Board's interpretation of OCSLA, but will respect its interpretation if it is reasonable. The court holds that the Board's interpretation of OCSLA coverage is erroneous. *Curtis v. Schlumberger Offshore Service, Inc.*, 849 F.2d 805, 21 BRBS 61 (CRT) (3d Cir. 1988).

If congressional intent is clear, that ends the inquiry of statutory interpretation, and the court and agency must give effect to the unambiguously expressed congressional intent; if the court determines that Congress has not addressed the precise question at issue, the court must ask whether the agency's interpretation is based upon a permissible construction of the statute, and, if so, the court may not substitute its own construction for that made by the agency. In this case the court adopted the Director's interpretation of Section 8(f). *Newport News Shipbuilding & Dry Dock Co. v. Howard*, 904 F.2d 206, 23 BRBS 131(CRT) (4th Cir. 1990).

In interpreting the statute, the court must determine whether Congress has addressed the issue. If Congressional intent is clear, the court may not impose its own views upon an unambiguous Congressional mandate. If Congressional intent is not clear, then the court will defer to a reasonable construction of the Act by the Director because the Director administers and enforces the Act. *Zapata Haynie Corp. v. Barnard*, 933 F.2d 256, 24 BRBS 160 (CRT)(4th Cir. 1991); *Pittman Mechanical Contractors, Inc. v. Director, OWCP*, 35 F.3d 122, 28 BRBS 89 (CRT) (4th Cir. 1994).

The Fourth Circuit states that the Board's interpretations are not entitled to deference as it is not a policy-making body, and in this case, the court declines to defer to the position of the Director, as it finds his position on a Section 2(3) issue both unreasonable and contrary to Congress' clear intent. *Weyher/Livsey Constructors, Inc. v. Prevetire*, 27 F.3d 985, 28 BRBS 57 (CRT) (4th Cir. 1994), *cert. denied,* U.S. , 115 S.Ct. 1691 (1995).

The Fourth Circuit notes that the Director supports the court's construction of the 10-day period in Section 14(f), but states it need not defer to her position since the statutory language is unambiguous. *Reid v. Universal Maritime Service Corp.*, 41 F.3d 200, 28 BRBS 118 (CRT) (4th Cir. 1994).

The Fourth Circuit holds that the Secretary's interpretation of which employers are required to pay an assessment to the Special Fund pursuant to Section 44 is entitled to deference in that his stance is not merely a litigating position and is a permissible construction of the statute. *National Metal & Steel Corp. v. Reich*, 55 F.3d 967, 29 BRBS 97 (CRT) (4th Cir. 1995).

The Fifth Circuit states that, generally, the Director's interpretation of the Act is entitled to deference, unless the administrative interpretation of the statute is contrary to the plain meaning of the statute. *Tanner v. Ingalls Shipbuilding, Inc.*, 2 F.3d 143, 27 BRBS 113 (CRT) (5th Cir. 1993).

The Sixth Circuit states that the Board's interpretation of the Act is not entitled to deference as it does not engage in policy making, and that the Director's interpretation is entitled to no greater deference than the Board's. *Director, OWCP v. Detroit Harbor Terminals, Inc.*, 850 F.2d 283, 21 BRBS 85 (CRT) (6th Cir. 1988); *American Ship Building Co. v. Director, OWCP*, 865 F.2d 727, 22 BRBS 15 (CRT) (6th Cir. 1989).

The Seventh Circuit will defer to the Director's construction of the Act and his articulations of administrative policy unless they are unreasonable or contrary to the purposes of the statute or clearly expressed legislative intent. No deference is due the Board's position as it does not administer the Act. *Jones v. Director, OWCP*, 977 F.2d 1106, 26 BRBS 64 (CRT) (7th Cir. 1992).

The Ninth Circuit states that since the Board is not a policy-making body, no special deference is owed its interpretations of the Act. The court will accord "considerable weight" to the construction of the Act urged by the Director, and where the statute is "easily susceptible" to the Director's interpretation, the court need not inquire further. *Force v. Director, OWCP*, 938 F.2d 981, 25 BRBS 13 (CRT) (9th Cir. 1991); *Port of Portland v. Director, OWCP*, 932 F.2d 836, 24 BRBS 137 (CRT) (9th Cir. 1991); *Hurston v. Director, OWCP*, 989 F.2d 1574, 26 BRBS 180 (CRT) (9th Cir. 1993); *Hunt v. Director, OWCP*, 999 F.2d 419, 27 BRBS 84 (CRT) (9th Cir. 1993).

The Eleventh Circuit states that because the Board is an adjudicative body, and not an administrator, its interpretations are entitled to no special deference. The court states it owes deference to official expressions of policy by the Director, who does administer the Act, but circuit law precludes it from affording deference to the agency's litigating position. *Alabama Dry Dock & Shipbuilding Corp. v. Sowell*, 933 F.2d 1561, 24 BRBS 229 (CRT) (11th Cir. 1991).

The Fifth Circuit notes that the Director's "administrative construction" of Section 4(a) is not entitled to judicial deference because the Director failed to show that her construction is anything other than a litigating position unsupported by regulations, rulings or administrative practice. *Total Marine Service v. Director, OWCP*, 87 F.3d 774, 776 n.2, 30 BRBS 62, 64 n.2(CRT) (5th Cir. 1996), *aff'g Arabie v. C.P.S. Staff Leasing*, 28 BRBS 66 (1994).

The Ninth Circuit rejected the Director's argument that it should grant deference to his position that working out of a hall that places maritime workers and a past history of maritime employment make one a maritime employee even on a wholly non-maritime job. The Ninth Circuit declined to defer to the Director's position because the statute is not ambiguous and easily susceptible to the Director's interpretation. *McGray Constr. Co. v. Hurston,* 181 F.3d 1008, 33 BRBS 81(CRT) (9th Cir. 1999), *rev'g* 29 BRBS 127 (1995).

The Ninth Circuit states that the Director's interpretation of the Act is limited where that interpretation is only a litigating position, not a regulation. Moreover, the court stated that, in this case, the Director's position that claimant's back condition qualifies as an occupational disease, rather than being a matter of statutory construction, is more properly a factual issue to which the court owes no agency deference. Lastly, the court ruled that it could not properly defer because the Director's overbroad definition of occupational disease is not reasonable. *Port of Portland v. Director, OWCP [Ronne],* 192 F.3d 933, 33 BRBS 143(CRT)(9th Cir. 1999), *cert. denied*, 120 S.Ct. 1718 (2000).

The Ninth Circuit stated that the Director's interpretation of the Act is entitled to deference if it is contained either in a regulation or in the Director's litigation position within an agency adjudication (as opposed to judicial proceedings), so long as the interpretation is reasonable. The Court clarifies some statements about deference it made in *Port of Portland v. Director, OWCP [Ronne],* 192 F.3d 933, 33 BRBS 143(CRT)(9th Cir. 1999), *cert. denied*, 529 U.S. 1086 (2000), and *McGray Constr. Co. v. Hurston,* 181 F.3d 1008, 33 BRBS 81(CRT) (9th Cir. 1999). *Gilliland v. E.J. Bartells Co., Inc.*, 270 F.3d 1259, 35 BRBS 103(CRT) (9th Cir. 2001), *aff'g* 34 BRBS 21 (2000).

The Fifth Circuit states that while neither the administrative law judge's nor the Board's legal interpretation of the regulations is entitled to deference, the Director's interpretation of the agency's own regulations is controlling unless that interpretation is plainly erroneous or inconsistent with the text of the relevant regulations. The court accords deference to the Director's interpretation that FRCP 6(a) should be used to supplement the time computation provision of 20 C.F.R. §802.221, such that the 10-day time period for filing a motion for reconsideration before the administrative law judge, 20 C.F.R. §802.206(a), excludes intermediate weekends and holidays. *Galle v. Director, OWCP,* 246 F.3d 440, 35 BRBS 17(CRT) (5th Cir. 2001), *aff'g Galle v. Ingalls Shipbuilding, Inc.,* 33 BRBS 141 (1999), *cert. denied*, 534 U.S. 1002 (2001).

The Fifth Circuit states that the exact amount of deference owed to a particular interpretation of the Act by the Director depends on the "thoroughness of its consideration, the validity of its reasoning, and its consistency with earlier and later pronouncements." The court accords deference to the Director's interpretation that the Section 2(2) "arises naturally out of" language requires only that the conditions of the employment be of a kind that produces the occupational disease, which the court held is consistent with congressional intent, as first interpreted in *Cardillo.* The court also defers to the Director's position that employer is not entitled to a credit, under the extra statutory *Nash* credit doctrine, for payments made by other potentially liable longshore employers in settlement of claimant's occupational disease claim. *New Orleans Stevedores v. Ibos,* 317 F.3d 480, 36 BRBS 93(CRT) (5th Cir. 2003), *aff'g in part and rev'g in part* 35 BRBS 50 (2001), *cert. denied,* 124 S.Ct. 1038 (2004).

Finality/Interlocutory Appeal

The Court of Appeals does not have jurisdiction to issue a stay before the Board has issued a final order in this case. Tideland Welding Service v. Director, OWCP, 817 F.2d 1211, 20 BRBS 9 (CRT) (5th Cir. 1987).

The D.C. Circuit granted a motion to dismiss a petition for review of the Board's decision in *Quinn*, 20 BRBS 65 (1986). The Court declined to review the Board's decision remanding the case to the administrative law judge for further factfinding, despite the fact that the decision included a conclusive determination regarding the applicability of Section 33(g), on grounds that this decision did not constitute a "final" order and was therefore not yet subject to review under Section 21(c) of the Act. *Washington Metropolitan Area Transit Authority v. Director, OWCP,* 824 F.2d 94, 20 BRBS 13 (CRT) (D.C. Cir. 1987).

On appeal of the Board's decision in *Dorsey*, 18 BRBS 25 (1986), the Eleventh Circuit granted a motion to dismiss the petition for review stating that a decision of the Board remanding a case to an administrative law judge for further findings of fact is not a final appealable order. *Cooper Stevedoring Co., Inc. v. Director, OWCP*, 826 F.2d 1011, 20 BRBS 27 (CRT)(11th Cir. 1987).

An administrative law judge's order may not be directly appealed to the Court of Appeals, but must first be appealed to the Board. Under Section 21(c) of the Act, a Court of Appeals may review only a "final order of the Board." RMK-BRJ v. Brittain, 832 F.2d 565, 20 BRBS 38 (CRT)(11th Cir. 1987).

Where the Board remanded the case to the administrative law judge to compute compensation adjustments, the Board's Order was not final, and precluded the First Circuit Court's review. Director, OWCP v. Bath Iron Works Corp. [Cain], 853 F.2d 11, 21 BRBS 130 (CRT)(1st Cir. 1988).

The Fifth Circuit held that the Board's order staying payments is a collateral final order and therefore subject to review because it conclusively determined an issue unreviewable on appeal. Rivere v. Offshore Painting Contractors, 872 F.2d 1187, 22 BRBS 52 (CRT) (5th Cir. 1989).

The Ninth Circuit dismissed for lack of jurisdiction claimant's appeal of the Board's order vacating the administrative law judge's order denying modification and remanding for application of a new legal standard, since the Board's remand order was not final. *Bish v. Brady-Hamilton Stevedore Co.,* 880 F.2d 1135, 22 BRBS 156 (CRT) (9th Cir. 1989).

The Ninth Circuit held that a stay of payment order is appealable (even if the merits of the case have not yet been resolved) under the collateral order doctrine because the validity of the stay of payments order is a separate issue from the merits of the action and Congress intended that deserving claimants be paid as soon as possible. The court held that it had authority to hear the appeal even though subject matter jurisdiction over the case as a whole may be lacking. *Edwards v. Director, OWCP*, 932 F.2d 1325,

24 BRBS 146 (CRT)(9th Cir. 1991).

Section 21(c) authorizes the circuit courts to only review final orders of the Board. Accordingly, an order from the Board remanding a case to the administrative law judge may not immediately be appealed. The Administrative Procedure Act, however, authorizes the circuit courts to review the decision to remand when the final order of the Board is appealed to the proper circuit. *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78 (CRT)(5th Cir. 1991), *rev'g in part* 19 BRBS 15 (1986); *see also Burns v. Director, OWCP*, 41 F.3d 1555, 29 BRBS 28 (CRT) (D.C. Cir. 1994).

The Ninth Circuit rejects employer's argument that the Board's order approving an attorney's fee for work performed before the Board is interlocutory. The court holds that the Board's fee order is reviewable since the underlying suit, the claim for benefits, has been settled; the fact that an appeal of the administrative law judge's award of an attorney's fee is pending before the Board has no bearing on the appealability to the court of the Board's attorney fee order. *Finnegan v. Director, OWCP*, 69 F.3d 1039, 29 BRBS 121 (CRT)(9th Cir. 1995).

The Eleventh Circuit held that an administrative law judge's decision which was administratively affirmed by the Board without review pursuant to Public Law No. 104-134 under which the Department of Labor is prohibited from using appropriated funds after September 12, 1996, to review cases which had been pending for more than a year as of that date, is final and ripe for review by the appeals court. The court stated that Congress has the power to amend the substantive law governing review of these cases through an appropriations bill. *Donaldson v. Coastal Marine Contracting Corp.,* 116 F.3d 1449, 31 BRBS 70(CRT) (11th Cir. 1997).

The Fifth Circuit noted that the Act affords employer a full pre-deprivation, trial-type hearing before an administrative law judge, as well as a post-deprivation hearing in the Courts of Appeals. Consequently, the Fifth Circuit concludes that employer was not deprived of property without due process because of the administrative affirmance of the administrative law judge's decision, and thus, affirms the constitutionality of the "one-year legislation." *Shell Offshore v. Director, OWCP*, 122 F.3d 312, 31 BRBS 129(CRT) (5th Cir. 1997), *cert. denied*, ___ U.S. ___, 118 S.Ct. 1563 (1998); *see also Gooden v. Director, OWCP,* 135 F.3d 1066, 32 BRBS 59(CRT) (5th Cir. 1998).

The D.C. Circuit held that the Omnibus Consolidated Rescissions and Appropriations Act, P.L. 104-134, is without effect on the District of Columbia Workmen's Compensation Act of 1928 inasmuch as since 1982, the D.C. Act may no longer be amended by cross-reference to the Longshore Act. Consequently, this case, which was remanded by the Board to the administrative law judge more than one year after the appeal was filed, is not ripe for appeal to the Court of Appeals. *Washington Metropolitan Area Transit Authority v. Beynum*, 145 F.3d 371, 32 BRBS 104(CRT) (D.C. Cir. 1998).

Standing

The Supreme Court affirms the Fourth Circuit's decision that the Director does not have standing to challenge the Board's affirmance of the administrative law judge's finding as to the date temporary total disability ended and permanent partial disability began because it does not affect the Director's administration of the Act or the fiscal integrity of the Special Fund. The Director thus is not a person "adversely affected or aggrieved" under Section 21(c) and lacks standing to appeal to the court of appeals. The Supreme Court narrowly defined the Director's area of responsibility; (1) supervising, administering, and making rules and regulations for calculation of benefits and processing of claims; (2) supervising, administering, and making rules and regulations for provision of medical care to covered workers; (3) assisting claimants with processing claims and receiving medical and vocational rehabilitation; and (4) enforcing compensation orders and administering payments to and disbursements from the Special Fund. The Director has no role in assuring the "correct" adjudication of a claim between private parties. *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Harcum],* U.S. , 115 S.Ct. 1278 (1995), *aff'g* 8 F.3d 175, 27 BRBS 116 (CRT) (4th Cir. 1993).

The Ninth Circuit, adopting the reasoning of the D.C. Circuit, holds that the scheme of the Act and the regulations clearly contemplate that the Director should be named a respondent in all review proceedings brought under Section 921(c), whether or not the Director supports the Board's order. *Goldsmith v. Director, OWCP*, 838 F.2d 1079, 21 BRBS 27 (CRT) (9th Cir. 1988).

The First Circuit dismisses employer's appeal of the Board's decision affirming a denial of medical benefits on the ground that, although eligible for such benefits, the reporting requirement was not met. As employer is not "adversely affected or aggrieved" by the Board's decision, it lacks standing to challenge the Board's eligibility finding, which the court states is *dicta*. *Bath Iron Works Corp. v. Coulombe*, 888 F.2d 179, 23 BRBS 21 (CRT) (1st Cir. 1989).

The Fourth Circuit dismissed the Director as a respondent, reaffirming its holding in *I.T.O. Corp. v. Benefits Review Board*, 542 F.2d 903, 906 (4th Cir. 1976)(*en banc*), *vacated and remanded on other grounds sub nom. Adkins v. I.T.O. Corp.*, 433 U.S. 904, 97 S.Ct. 2967, 53 L.Ed.2d 1088 (1977), that the Director shall not automatically be named as a respondent in a petition for review under the Act, but must make an affirmative showing that she is "adversely affected or aggrieved by the decision of the Board." The court further reaffirmed its holding in *I.T.O Corp.* that the Director may, if not adversely affected or aggrieved by the Board's decision, request and be granted permission to intervene on the side of the party whose position she supports. The court granted the Director's motion in this case to intervene *nunc pro tunc* on the side of petitioners. *Parker v. Director, OWCP*, 75 F.3d 929, 30 BRBS 10 (CRT) (4th Cir. 1996), *cert. denied,* ___U.S. __, 117 S.Ct. 58 (1996).

The Fifth Circuit denies employer's motion to strike the Director's brief because the Director is not "affected or aggrieved" within the meaning of 33 U.S.C. §921(c); rather, under Fed. R. App. P. 15(a), together with the Act and regulations thereunder, the Director is the agency-respondent and therefore entitled to respond. The court also rejected claimant's motion to dismiss employer's appeal for lack of standing. Specifically, employer was "adversely affected or aggrieved" under Section 21(c) by the district director's orders granting claimants' motions to withdraw after employer had requested that the claims be referred for a formal hearing. The orders stripped employer of a valuable procedural right, namely the right to have the claims decided by an administrative law judge. *Ingalls Shipbuilding, Inc. v. Director, OWCP,* 102 F.3d 1385, 31 BRBS 1 (CRT), *vacating on reh'g* 81 F.3d 561, 30 BRBS 39(CRT) (5th Cir. 1996) (reaching same result under a mandamus order later determined to be inapplicable to the cases on appeal), *rev'g Boone v. Ingalls Shipbuilding, Inc.*, 28 BRBS 119 (1994) (*en banc*)(Brown, J., concurring), *aff'g on recon.* 27 BRBS 250 (1993) (Brown, J., concurring).

The Supreme Court held that the right to appear as a respondent before the courts of appeals is conferred upon the Director, OWCP, by Federal Rule of Appellate Procedure 15(a). In so holding, the Court decline to adopt the narrower reading of Rule 15(a) set forth in *McCord*, 514 F.2d 198 (D.C. Cir. 1975) and *Parker,* 75 F.3d 929, 30 BRBS 10 (CRT) (4th Cir. 1996). The Supreme Court further decided that the Director, as opposed to some other departmental entity, may be named as a respondent by the courts of appeals. The Director as respondent is free to argue on behalf of any position. *Ingalls Shipbuilding, Inc. v. Director, OWCP [Yates]*, ___ U.S. ____, 117 S.Ct. 796, 31 BRBS 5(CRT) (1997), *aff'g* 65 F.3d 460, 29 BRBS 113 (CRT) (5th Cir. 1995).

New Issues Raised Before the Court

The Sixth Circuit held that where claimant failed to raise the issue of the administrative law judge's alleged bias by filing an affidavit articulating the facts and reasons justifying the charge until after an adverse decision on the merits, claimant failed to preserve the issue for appeal. *Orange v. Island Creek Coal Co.,* 786 F.2d 724, 8 BLR 2-192 (6th Cir. 1986)(black lung case).

Where employer failed to file a cross-appeal of an issue before the Board, it could not be raised for the first time before the court of appeals. *Alabama Dry Dock & Shipbuilding Co. v. Director, OWCP,* 804 F.2d 1558, 19 BRBS 61 (CRT)(11th Cir. 1986).

The Director's argument that employer waived its right to raise Section 8(f) by not raising it when the initial claim was litigated in 1966 was raised for first time at oral argument before the appellate court. Since it was not raised before the administrative law judge or Board, the issue was not properly before the court. *Director, OWCP v. Edward Minte Co.,* 803 F.2d 731, 19 BRBS 27 (CRT) (D.C. Cir. 1986), *aff'g Dixon v. Edward Minte Co.,* 16 BRBS 314 (1984).

Where an issue raised by claimant before the administrative law judge was not reached by either the administrative law judge in his decision awarding benefits or by the Board on appeal, claimant is not precluded from raising that issue before the circuit court in response to an argument by employer on appeal where the raising of that issue below would have been futile. *SAIF Corp./Oregon Ship v. Johnson*, 908 F.2d 1434, 23 BRBS 113 (CRT) (9th Cir. 1990).

The Fifth Circuit refuses to consider employer's argument that its First Report of Injury form is the functional equivalent of a notice of controversion, as employer did not raise this issue in the administrative proceedings below. *Ingalls Shipbuilding, Inc. v. Director, OWCP*, 976 F.2d 934, 26 BRBS 107 (CRT) (5th Cir. 1992), *aff'g Benn v. Ingalls Shipbuilding, Inc.*, 25 BRBS 37 (1991).

Where the district court imposed a Section 14(f) penalty on employer but denied the claimant fees, costs and interest, the Second Circuit declined to consider the claimant's renewed request for fees, costs and interest, as it was made in response to the employer's appeal and not on cross-appeal. *Burgo v. General Dynamics Corp.*, 122 F.3d 140, 31 BRBS 97(CRT), *reh'g denied,* 128 F.3d 801 (2d Cir. 1997), *cert. denied,* 118 S.Ct. 1839 (1998).

The First Circuit acknowledged that employer's argument that the carrier had failed to raise the issue of responsible carrier in a cross-appeal had merit. Nonetheless, having previously concluded that the administrative law judge had not erred in determining the date of claimant's injury under Section 10(i), and that the carrier was employer's insurer on that date, the court affirmed the administrative law judge's finding that the carrier was responsible for claimant's benefits. *Leathers v. Bath Iron Works & Birmingham Fire Ins.*, 135 F.3d 78, 32 BRBS 169(CRT) (1st Cir. 1998).

The Fifth Circuit declines to address employer's contention that its notice of final payment form satisfies the prerequisites for a notice of controversion such that it is not liable for a Section 14(e) penalty. Employer did not raise this issue before the Board, and the court therefore is precluded from addressing the issue. *James J. Flanagan Stevedores, Inc. v. Gallagher*, 219 F.3d 426, 34 BRBS 35(CRT) (5th Cir. 2000).